Supreme Court, U.S.
FILED

No. 06-822 DEC 12 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

CAROLYN G. KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MILES J. ZAREMSKI
Counsel of Record
KAMENSKY RUBINSTEIN HOCHMAN AND DELOTT, LLP
7250 N. Cicero Avenue, Suite 200
Lincolnwood, Illinois 60712
Telephone: (847) 982-1776
Facsimile: (847) 982-1676

DAVID L. FAIGMAN
200 McAllister Street
San Francisco, California 94102-4978
Telephone: (415) 565-4739
Facsimile: (415) 565-4865

PETER C. CARSTENSEN
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, Wisconsin 53706
Telephone: (608) 263-7416
Facsimile: (608) 262-5485

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
Telephone: (202) 944-2874
Facsimile: (202) 965-0920

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether lower courts err when they meld the standards for summary judgment under Fed. R. Civ. Proc. 56 and the relevance and reliability requirements for admissibility under Fed. R. Evid. 702?

2. Whether, in order to clarify the distinction between admissibility decisions and evidence sufficient to grant a summary judgment, courts have an obligation to give reasons – which cannot include weighing the testimony – why admissible expert evidence that reaches all material facts necessary to establish a claim for relief under applicable law is not sufficient to avoid summary judgment?

INTERESTED PARTIES

Petitioner Carolyn G. Kochert, M.D., individually.

Respondents Greater Lafayette Health Systems, Inc., an Indiana corporation created 9/21/1998; Anesthesiology Associates, PC, an Indiana domestic professional corporation created 9/29/1989; and John Walling, an individual acting in a representative capacity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	v
APPENDIX INDEX	ix
CITATIONS	1
STATEMENT OF BASIS FOR JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE	6
1. Factual Background	6
2. Procedural History	8
3. Reasons for Allowing Writ	10
ARGUMENT IN SUPPORT OF PETITION	11
A. A lower court has a basic obligation to provide reasons explaining why it granted summary judgment notwithstanding the admissibility of expert opinion that reaches all material facts necessary to establish a cause of action	11
1. Conflict and Confusion Between Admissibility and Sufficiency	15
2. Fit, Materiality and the "Space" Between Admissibility and Sufficiency	17
B. The lower courts' analysis of antitrust standing and injury failed to give reasons why admitted expert testimony was insufficient for a jury to decide standing	20

TABLE OF CONTENTS – Continued

Page

C. Admitted expert testimony and other proofs contradicted the courts' findings that Petitioner had not met her burden to provide sufficient evidence 27

D. Did the trial and appellate courts below err in weighing the persuasiveness of admitted expert testimony and granting summary judgment, notwithstanding admissible expert testimony on disputed material facts that should have been submitted to a jury for decision?..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ambrosini v. Labarraque and The Upjohn Co., 101 F.3d 129 (C.A. D.C.C. 1996) 16, 22

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 21

Aspen Highlands v. Aspen Skiing Co., 472 U.S. 585 (1985) 22

Aspen Highlands v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) 22

Assoc. Gen'l Contractors v. California Council of Carpenters, 459 U.S. 519 (1983) 21, 26

Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002) 14, 15

Baltimore & Carolina, Inc. v. Redman, 295 U.S. 654 (1935) 26

Barnes v. The Kerr Corp., 418 F.3d 583 (6th Cir. 2005) 14, 15

Bell Atlantic v. Twombly, 126 S. Ct. 2965, *cert. granted* (6-26-2006) 11

Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) 21

Bourns, Inc. v. Raychem Corp., 331 F.3d 704 (9th Cir. 2003) 21

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 24

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 21

TABLE OF AUTHORITIES – Continued

Page

Carolyn G. Kochert, M.D. v. Greater Lafayette Health Systems, Inc., et al., 463 F.3d 710 (7th Cir. 2006) 1

Carolyn G. Kochert, M.D. v. Greater Lafayette Health Systems, Inc., et al., 372 F. Supp.2d 509 (N.D. Ind. 2004) 1

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10, 13

Chicago Prof. Sports Ltd. P'ship. v. NBA, 961 F.2d 667 (7th Cir. 1992) 24

Consolidated Metal Products, Inc. v. Am. Petroleum Institute, 846 F.2d 284 (5th Cir. 1988) 24

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 22

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) 18

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 29

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 15

Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083 (10th Cir. 2000) 4, 17

Gorris v. Scott, 9 L.R. Ex.-125 (1874) 21

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1983) 24

In re Joint Eastern & Southern Dist. Asbestos Litig. v. U.S. Mineral Products Co., 52 F.3d 1124 (2d Cir. 1995) 16

TABLE OF AUTHORITIES – Continued

Page

Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir. 1984) 21

Lie v. St. Joseph Hospital, 964 F.2d 567 (6th Cir. 1992) 25

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 10, 15

Morgan v. United Parcel Service of America, Inc., 380 F.3d 459 (8th Cir. 2004) 14, 15

New York Medscan LLC v. New York University School of Medicine, 430 F. Supp.2d 140 (S.D.N.Y. 2006) 25

NicSand, Inc. v. 3M Co., 457 F.3d 534 (6th Cir. 2006) 21, 23

Norris v. Baxter Healthcare Corp., 397 F.3d 878 (10th Cir. 2005) 16

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088 (9th Cir. 1998) 14, 15

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 957 F. Supp. 1184 (D. Nev. 1997) 15

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 13

U.S. v. Continental Oil Co., 377 U.S. 161 (1964) 17

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341 (Fed. Cir. 2004) 21, 23

Unitherm Food Systems, Inc. v. Swift-Eckrich, 126 S. Ct. 980 (2006) 26

Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241 (2d Cir. 2004) 17

TABLE OF AUTHORITIES – Continued

Page

Weisgram v. Marley Co., 528 U.S. 440 (2000) 12

Wildbur v. Arco Chemical Co., 974 F.2d 631 (5th Cir. 1992) 5, 17

STATUTES

15 U.S.C. § 1 *et seq.* 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 8

28 U.S.C. § 1337(a) 8

28 U.S.C. § 1367(a) 8

28 U.S.C. § 1391(b) 8

Indiana Code 24-1-2-1 8

Indiana Code 24-1-2-2 8

Indiana Code 24-1-2-7 8

OTHER AUTHORITIES

Areeda and Hovenkamp, Antitrust Law 2002 23

Areeda and Hovenkamp, *Standing of Private Plaintiffs,* Fundamentals of Antitrust Law (Aspen Publ. (2006 Suppl.)) 21

Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 Antitrust L.J. 663 (1997) 3, 4, 15, 20

TABLE OF AUTHORITIES – Continued

Page

Rothstein, *Opinion and Expert Testimony in Federal and State Courts*, Manual for Complex Litigation: Expert Scientific Evidence, SL084 ALI-ABA 189 (2006) 4, 16, 20

RULES

Fed. R. Civ. P. 12(b)(6) 8, 12, 20

Fed. R. Civ. P. 56(c) 2, 13

Fed. R. Civ. P. 56(e) 2

Fed. Rule of Evid. 702 ..... 1, 3, 4, 12, 17

APPENDIX INDEX

Seventh Circuit Opinion ..... App. 1

District Court Opinion ..... App. 18

District Court Daubert Ruling: Seaman ..... App. 35

District Court Daubert Ruling: Gertler ..... App. 47

District Court Daubert Ruling: Minore ..... App. 53

District Court Daubert Ruling: Hofman ..... App. 59

District Court Order Denying 12(b)(6) Motions ..... App. 64

District Court Order re: Jury Demand ..... App. 70

App. Ct. Order Denying Pet. for Reh'g. and Pet. for Reh'g. En Banc ..... App. 72

Portions of Seaman Report ..... App. 73

Chart of Market Definition ..... App. 89

Portions of Seaman Deposition ..... App. 90

Gertler Affidavit ..... App. 101

TABLE OF AUTHORITIES – Continued

Page

Portions of Gertler Deposition ..... App. 103

Minore Affidavits ..... App. 110

Portions of Minore Deposition ..... App. 119

Computations by Hofman ..... App. 122

Ivankovich Affidavit ..... App. 125

Portions of Eberle Deposition ..... App. 128

Two column chart showing failure of lower courts to explain why expert testimony insufficient ..... App. 132

CITATIONS

Carolyn G. Kochert, M.D. v. Greater Lafayette Health Systems, Inc., et al., 463 F.3d 710 (7th Cir. 2006); *Carolyn G. Kochert, M.D. v. Greater Lafayette Health Systems, Inc., et al.*, 372 F. Supp.2d 509 (N.D. Ind. 2004).

STATEMENT OF BASIS FOR JURISDICTION

Date of judgment/order sought to be reviewed: September 12, 2006; December 29, 2004 and *Daubert* rulings of November 15, 2004.

Petition for Rehearing and Rehearing en Banc denied October 6, 2006.

28 U.S.C. § 1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

28 U.S.C. § 1291 conferred jurisdiction upon the Court of Appeals for the Seventh Circuit.

STATUTORY PROVISIONS INVOLVED

Fed. Rule of Evid. 702 provides, in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Civ. P. 56(c) provides, in relevant part:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . .

Fed. R. Civ. P. 56(e) provides, in relevant part:

. . . but the adverse party's response, by affidavits or otherwise, provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

PRELIMINARY STATEMENT

The district court below, after conducting a two-day hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), held that all five[1] of the plaintiff's experts met the standards of relevance and reliability. Subsequently, however, the trial court concluded that this and other evidence was not "persuasive" and granted the defendants' motions for summary judgment. This ruling reflected the court's confusion regarding the force of admissible expert evidence when making determinations regarding the sufficiency of the evidence

[1] Ivankovich's testimony was admitted without challenge. *Infra* at 9-10.

for purposes of summary judgment, and presents this Court with an opportunity to rectify the recurring situation of trial courts overreaching by arrogating to themselves the role reserved by the Constitution to the jury.

The district court did not identify any material facts on which plaintiff had failed to offer adequate proof. Indeed, the district court did not give reasons for why any of the admissible proof was insufficient regarding any particular material facts that were necessary to sustain a claim for relief. The district court, contrary to the most elementary requirements of this Court's precedents, weighed the evidence and concluded that it was not "ultimately persuasive." By so doing, the district court invaded the province of the jury and deprived the plaintiff of a basic constitutional right.

The United States Court of Appeals for the Seventh Circuit ratified and compounded the district court's error by similarly weighing the proffered expert testimony and resolving the case on the merits. Just as had the district court before it, the appellate court melded sufficiency and admissibility when it weighed the expert evidence in support of its conclusion that summary judgment was proper in this case. The Seventh Circuit failed to explain why admissible expert testimony was insufficient to sustain a claim for relief.

This case presents the nether region between admissibility under Rule 702 of the Federal Rules of Evidence and sufficiency under Rule 56 of the Federal Rules of Civil Procedure. Subsequent to *Daubert*, lower courts have increasingly grown confused regarding the relationship between admissibility and sufficiency. Gavil, *After Daubert: Discerning the Increasingly Fine Line Between*

the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation, 65 Antitrust L.J. 663 (1997). Indeed, according to Judge Barbara Jacobs Rothstein, the current Director of the Federal Judicial Center, a "conflict in the circuits" has developed over whether the inquiry under Rule 702 is separate from any inquiry into sufficiency. Rothstein, *Opinion and Expert Testimony in Federal and State Courts*, Manual for Complex Litigation: Expert Scientific Evidence, SL084 ALI-ABA 189, 202-203 (2006) (citing cases). The disarray in the lower courts creates confusion for litigants regarding where the line is located that divides admissibility and sufficiency. This confusion has manifested itself in the reasons courts give for directing verdicts, explanations that have increasingly reflected a mixture of admissibility and sufficiency bases. This case illustrates this confusion.

This case also presents the exceedingly important question of whether courts must give reasons why admissible expert evidence that reaches all material facts necessary to establish a cause of action under applicable law is not sufficient to avoid summary judgment. To the extent that the boundary between admissibility and sufficiency is not well marked, lower courts can make plain the bases for their holdings by explaining how they reached their judgments. It has long been standard practice among courts to give reasons for admitting or excluding expert evidence under *Daubert* and Rule 702 (*Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) ("[W]e specifically hold that a district court, when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.")), just as

there has been a long tradition of giving reasons explaining why admitted evidence was not sufficient to establish a claim for relief. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 644 (5th Cir. 1992) ("[A] district court [must] explain its reasons for granting summary judgment in sufficient detail . . . to determine whether the court correctly applied the appropriate test.")

It appears, therefore, that the procedural requirements to get a case before a jury have become muddled. This muddle sows confusion among litigants regarding the standards that they must meet both in responding to expert testimony challenges and in opposing motions for summary judgment. Because this case presents such an unusual circumstance – summary judgment granted in the teeth of admitted expert testimony – it presents a unique vehicle for this Court to visit the admissibility and sufficiency intersection. In short, Petitioner urges the Court to untangle the conflict between admissibility and sufficiency and to also make plain the need for lower courts to give reasons for their rulings. In this case, this practice would have resulted in the lower courts giving reasons for why admitted expert testimony that reached all material facts in dispute was not sufficient to overcome summary judgment. Forcing trial courts to articulate reasons for allowing summary judgments in the face of admitted expert testimony on burdens of proof consistent with prevailing law will also (1) lay out a template for future litigants to follow concerning what is expected of them; and (2) focus reviewing courts on whether summary judgment's sufficiency standard has been met under such circumstances.

STATEMENT OF THE CASE

1. Factual Background

Carolyn G. Kochert, M.D. ("Petitioner") is a physician, who has practiced medicine in Lafayette, Indiana since 1985. She has all appropriate licensures and privileges to practice anesthesiology at the Respondent Greater Lafayette Health Systems' ("GLHS") two hospitals, Home Hospital ("HH") and St. Elizabeth's Medical Center ("SEMC"). Her licenses and privileges have never been revoked, suspended, modified or in any way challenged by governing authorities at any time. Throughout the entire time period of this case, and through the filing of this Petition, Petitioner remains in Lafayette as a competitor in anesthesiology. She has been sought out by patients and physicians alike for her abilities and expertise.[2] She has held numerous positions on hospital staffs, including President of Home Hospital. She was also Outstanding Business and Professional Woman of the Year in her community.

An exclusive dealing, no-bid contract was entered into between HH and Respondent, Anesthesiology Associates, PC ("AA") as of September 1, 1994. Respondent John Walling ("Walling"), then president of HH, executed the exclusive contract on behalf of HH; Kenneth Bochenek, M.D. ("Bochenek"), executed the contract on behalf of AA as its president. The contract required that those not within the group be required to execute subcontracts with AA. Petitioner did so. This exclusive contract was periodically renewed over the next decade, again without bidding.

---

[2] Over four dozen affidavits were filed with the district court to support this.

In October, 1997, HH and SEMC announced their merger, with GLHS becoming the new entity. In the fall, 1997, considerable animus developed between Bochenek and Walling, on the one hand, and Petitioner, on the other, over patient care issues. Walling became CEO of GLHS in 1998. GLHS accepted assignment of the exclusive contract in November, 1998.

In December, 1997, Petitioner was advised by Bochenek that her subcontract would not be renewed, effective March 1, 1998. This was the first occasion that a competitor in anesthesiology was excluded from the market. Both Walling and Bochenek also testified to the non-existence of the exclusive arrangement requiring these subcontracts as of March 1, 1998.

In April, 1999, GLHS closed the obstetrical unit, including labor and delivery, at SEMC, and consolidated it with the unit at HH. After this closure, Petitioner could not provide obstetrical anesthesia to patients at GLHS.

In or about 2000, a multi-specialty physician practice and outpatient facility opened, called Unity Healthcare ("Unity"). Petitioner became a member of Unity. GLHS considered Unity to be a competitor and consequently its member physicians to be competitors offering competitive services to GLHS and its exclusive provider of anesthesia services.

As a result of the animus that occurred with Petitioner, and the operation of the exclusive contract, Petitioner was forced to look for other work in the field of medicine besides anesthesiology as early as March 1, 1998. Because of deep roots in the community, and raising six children with her husband where she was the primary means of financial support, she chose to train for, and then

establish, a pain management practice in the Lafayette market. She continued consulting and interacting with nursing personnel and physicians at GLHS, as well as seeing/treating patients there, even to this very day. Though she established a pain management practice full time as of the fall, 2000, she occasionally rendered anesthesia services at Unity. (Petitioner was, nonetheless, ready, willing and able to continue practicing anesthesiology full time at GLHS, as late as 2002-2003. Her written requests to do this during these time periods were rebuffed by the GLHS administration.)

28 U.S.C. § 1337(a) and 28 U.S.C. § 1331 conferred original subject matter jurisdiction and 28 U.S.C. § 1367(a) conferred supplemental jurisdiction upon the United States District Court, Northern District of Indiana, Hammond Division at Lafayette. Venue was established pursuant to 28 U.S.C. § 1391(b).

2. Procedural History

Petitioner filed a lawsuit on May 8, 2001 pursuant to §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and analogous sections of the Indiana Code, I.C. 24-1-2-7 for violations of I.C. 24-1-2-1, and 24-1-2-2. Leave was granted to file a First Amended Complaint on September 18, 2001.

Respondents filed Fed. R. Civ. P. 12(b)(6) motions to dismiss based on lack of antitrust standing and antitrust injury. The trial court denied these motions on January 11, 2002. App. 64-69.

In their answers to both Petitioner's complaint and amended complaint, Respondents admitted that their exclusive dealings involved interstate commerce.

On May 28, 2002, the trial court granted Petitioner's request for a jury trial. App. 70.

Douglas Eberle, GLHS' CEO after Walling retired, admitted that economics for GLHS played into contracts for anesthesiology; this was favorable for GLHS because third party payors providing patients to GLHS would use GLHS as a preferred provider. App. 128-131.

In the course of discovery, Petitioner identified five expert witnesses who would testify on her behalf: Bruce Seaman, PhD ("Seaman") and Paul Gertler, PhD ("Gertler") – economists; Stephen Minore, M.D. ("Minore"), Anthony Ivankovich, M.D. ("Ivankovich"), and, by way of affidavit relied upon by Minore, Karen Williams, M.D. – all testifying to quality of care; and Cornelius Hofman, M.B.A. ("Hofman"), who testified on Petitioner's damages.

Respondents disclosed as their experts economists David M. Eisenstadt, PhD ("Eisenstadt"), and Edward Heiden, PhD ("Heiden"), Bryan Liang, M.D., J.D., PhD ("Liang") and David Barbara, M.D. ("Barbara"). Eisenstadt and Heiden testified to antitrust standing, injury and markets; Liang reported on injury to competition, quality of care and pricing; and Barbara addressed anesthesia practice and quality of anesthesia care at GLHS.

Respondents moved to strike the testimony of Seaman, Gertler, Minore and Hofman pursuant to *Daubert*. Petitioner challenged Barbara's testimony pursuant to *Daubert* as well. Following extensive pleadings (29 docket entries), the trial court issued its *Daubert* rulings on November 15,

2004, denying Respondents' challenges. App. 35-63. Petitioner's challenge to Barbara was similarly denied.

On December 29, 2004, the district court granted Respondents' pending motions for summary judgment. App. 18-34.

The Seventh Circuit Court of Appeals affirmed the trial court's decision on September 12, 2006 (App. 1-17), and, in so doing, allowed to stand the trial court's rulings admitting the testimony of Seaman, Gertler, Minore, and Hofman.

A Petition for Rehearing and Rehearing en Banc was denied on October 6, 2006. App. 72.

3. Reasons for Allowing Writ

Weighing admitted expert testimony in the face of summary judgment without explaining why such testimony is insufficient to avoid a judgment as a matter of law illustrates the tension that now exists between lower courts' use of the *Celotex* trilogy[3] and the purpose and

---

[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S. Ct. 2505 (1986).

It should be noted explicitly that *Matsushita* is inapposite to the situation presented in the instant case. A key point in contention in that case was the value of the "DePodwin Report," which Justice White, dissenting, believed "alone creates a genuine factual issue. . . ." *Matsushita*, 475 U.S. at 603 (White, J., dissenting). This Court, however, found the district court's view of the DePodwin Report persuasive. *Id.* at 594, n.19. The district court had found the report to be inadmissible under Rule 702, not insufficient for purposes of summary judgment. *Matsushita*, therefore, represents an instance (albeit before *Daubert*) of the usual situation in which exclusion of

(Continued on following page)

effect of the *Daubert* decision. In short, the lower courts in this case applied an admixture of evidentiary and sufficiency constructs to weigh evidence and direct a finding against Petitioner. Lower courts should make clear the bases for their rulings, whether on evidentiary or sufficiency grounds. Such clarity in this case would have made plain that the Petitioner's admitted expert testimony more than adequately satisfied the demands of summary judgment. In granting this Petition, this Court will be afforded the opportunity to address these issues and thereby clarify the intersection of Rule 702's admissibility requirements and Rule 56's sufficiency.[4]

ARGUMENT IN SUPPORT OF PETITION

A. A lower court has a basic obligation to provide reasons explaining why it granted summary judgment notwithstanding the admissibility of expert opinion that reaches all material facts necessary to establish a cause of action.

The principle behind this Petition is at bottom a practical one. The lower courts failed to give Petitioner

expert testimony leads inexorably to summary judgment. In the instant case, of course, all of the Petitioner's experts were admitted.

[4] On November 27, 2006, this Court heard oral arguments in *Bell Atlantic v. Twombly* (*cert. granted* 6-26-2006 (126 S. Ct. 2965)) ("*Bell Atlantic*"). The instant case is a logical next step for this Court to tackle after confronting in *Bell Atlantic* the importance of careful application of pleading and proof requirements in complex and costly litigation. Whereas in *Bell Atlantic* this Court will clarify the terrain surrounding antitrust pleading requirements, the instant case presents the opportunity for this Court to clarify the terrain at the intersection of admissibility and sufficiency.

clear guidance regarding what is necessary to have a jury hear her claim. The requisites on the road to a jury trial to date have been many[5] and, most unfortunately, their results have been inconsistent with the final outcome. In particular, the courts below blended admissibility and sufficiency principles to sustain the final determination that resulted in the grant of summary judgment for the defendants. With this Petition, we ask this Court to reverse the judgment below, clarify the different standards that apply to admissibility decisions and summary judgment determinations, and allow Petitioner her day in court.

It is hornbook law that the procedural standards differ at the two junctures of admissibility and sufficiency, but are so closely related that considerable confusion exists in their application. Under Rule 702, and as first set forth in *Daubert*, the proponent of expert testimony has the burden to demonstrate that expert opinion is based on good grounds. The judge as gatekeeper is responsible for evaluating the reliability of the basis for proffered opinion. This is an exacting standard. *See Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("Since *Daubert*, . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.") The

[5] They have included the following: (a) surviving Fed. R. Civ. P. 12(b)(6) challenges to her lawsuit; (b) having to identify and disclose expert witnesses to fortify her burdens of proof consistent with prevailing law; (c) filing multi-page memoranda in opposition to Respondents' motions to strike expert testimony pursuant to *Daubert* challenges; (d) filing a memorandum of law requested by the district court as to Seventh Circuit law on *Daubert*; (e) participating in lengthy, two days of hearings pursuant to *Daubert* on Respondents' motions to strike testimony; and (f) overcoming *Daubert* challenges.

proponent bears the burden of proof to demonstrate the reliability of his or her expert's testimony. Moreover, on appeal, the trial court's decision to admit or exclude the evidence is given deference. The evidentiary requirements for expert opinion are not easily met. Yet, in this case, the district court ruled that all of Petitioner's experts were admissible, and the Seventh Circuit did not find this ruling to be an abuse of discretion.

Summary judgment erects a very different edifice. A summary judgment is permitted only if, when all of the facts are construed in the light most favorable to the non-moving party, without making credibility determinations or weighing the evidence, there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Although summary judgment puts significant demands on the parties, it is designed to ensure merely that the parties' cases are sufficiently worthy to proceed to trial.

At the same time, while admissibility and sufficiency occupy separate procedural pedestals, they are closely inter-related. *Daubert* serves to ensure that there is some reliable and valid basis for proffered expert testimony. In effect, admissibility decisions are grist for summary judgment's mill. If any of the essential parts of a party's case fails *Daubert*, summary judgment clears the court's docket of these deficient cases. But district courts have taken their gatekeeping role beyond the expanse of *Daubert* to where they are deciding material questions of fact reserved for a jury. Equally true, though, is that when

all of the essential parts of a party's case pass *Daubert*, this will virtually always be enough to proceed to trial.

Indeed, summary judgment often follows a district court's exclusion of expert testimony, since this tends to render the non-moving party's proof insufficient to create a genuine issue as to any material fact. When expert testimony is deemed admissible, of course, it is invariably enough to create a dispute about a material fact. The more routine situation involves cases in which expert testimony may be admissible, but there remain facts on which the non-moving party has not produced expert or non-expert evidence sufficient to create a genuine issue. In fact, a thorough search of the post-*Daubert* literature reveals only four cases in which summary judgment was granted in the teeth of admissible expert testimony, and these four are instances of the more generally observed phenomenon in which no expert proof was offered as to one or more required facts.[6] This case, therefore, presents the situation

---

[6] These cases are *Barnes v. The Kerr Corp.*, 418 F.3d 583 (6th Cir. 2005); *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459 (8th Cir. 2004); *Bailey v. Allgas, Inc.*, 284 F.3d 1237 (11th Cir. 2002); and *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998) ("*Rebel Oil*"). A close examination of these decisions reveals that they are not precedent for granting summary judgment in the face of previously admitted expert testimony.

In *Barnes*, the Sixth Circuit found that, despite the admissibility of the non-moving party's experts, he had failed to establish a required element of his proof – causation – and that, in any event, the numerous warnings provided by [the moving party] " . . . were adequate as a matter of law" *Barnes*, 418 F.3d at 591.

In *Morgan*, the Eighth Circuit initially noted that the district court had granted summary judgment without reaching the moving party's objections to the opponent's expert testimony. *Morgan*, 380 F.3d at 463. The Eighth Circuit, however, surmised that the district court had been troubled by methodological weaknesses in the non-moving party's

(Continued on following page)

in which summary judgment was granted notwithstanding admissible expert testimony on all of the facts necessary to establish a claim for relief under applicable law.

1. Conflict and Confusion Between Admissibility and Sufficiency

While this case is almost unique in its presentation of the issue, the issue itself is hardly novel, or even unusual. Just as occurred here, the lower courts often confuse admissibility and sufficiency. Gavil, "*After Daubert . . . ,*" *supra* at 3-4, 65 Antitrust L.J. at 704 (in *Matsushita*,

---

expert testimony concerning certain regression analyses conducted – an admissibility consideration. The *Morgan* court then proceeded to review the lower court's ruling *de novo*, since no admissibility determination had been made below, and affirmed the lower court's summary judgment ruling.

In *Bailey*, the trial court there had found the proffered expert to be inadmissible (*Bailey*, 284 F.3d at 1246), and the Eleventh Circuit itself found the expert opinion to be inconsistent with the facts that were not controverted. *Id.* at 1255.

In *Rebel Oil*, the moving party argued that the district court acted properly in finding the non-moving party's expert testimony was admissible, but that summary judgment was nonetheless appropriate. *Rebel Oil Co., Inc.*, 146 F.3d at 1096-1097. A closer look at *Rebel Oil*, however, indicates that, like *Barnes*, the case illustrates the circumstance when the complaining party is unable to establish a required element of his proof, and, thus, the expert testimony is not sufficient as a matter of law. 146 F.3d at 1097; *see Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 957 F. Supp. 1184, 1202 (D. Nev. 1997) (expert's measurement of marginal cost of gasoline contrary to law (509 U.S. at 223)). Moreover, the *Joiner* language that the Ninth Circuit relied upon to define their sufficiency analyses for purposes of summary judgment, in fact, defines the admissibility standard under *Daubert*. When a court concludes that "there is simply too great an analytical gap between the data and the opinion proffered," there is "nothing in either *Daubert* or the Federal Rules of Evidence [that] requires a district court to *admit* [that] opinion evidence." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (emphasis added).

admissibility and sufficiency collapsed into a single inquiry). In the more typical case, courts rule on admissibility challenges by incorporating the demands of sufficiency into the admissibility determination. As noted above, Judge Rothstein has described the conflict that exists among the lower federal courts regarding whether the admissibility determination is separate from the sufficiency judgment. *Supra* at 4; *see, e.g.*, *In re Joint Eastern & Southern Dist. Asbestos Litig. v. U.S. Mineral Products Co.*, 52 F.3d 1124, 1132-1133 (2d Cir. 1995) (sufficiency inquiry lies further down the litigational road and is separate from admissibility); *Ambrosini v. Labarraque and The Upjohn Co.*, 101 F.3d 129, 132, 134-135, 141 (C.A. D.C.C. 1996) (if expert testimony is reliable and "fits" an issue in the case, the trier of fact should weigh it); and *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 (n.2) (10th Cir. 2005) (relevant testimony logically advances a material aspect of the case). Indeed, the Seventh Circuit's decision in the instant case is in direct conflict with the Second Circuit's ruling in *In re Joint Eastern & Southern Dist. Asbestos Litig.* In the latter, the Second Circuit reversed a district court's judgment as a matter of law, finding that it had imported *Daubert* gatekeeping principles into its sufficiency evaluation. In that case, as is true here, the district court weighed the evidence and directed a verdict notwithstanding the admissible expert opinion. But in that case, the Second Circuit reversed the trial court's overreaching, concluding that, "*Daubert* left the traditional sufficiency standard intact." 52 F.3d at 1132. In the instant case, in contrast, the Seventh Circuit affirmed the trial court's inflation of the sufficiency standard, thus rejecting the "[p]assages in *Daubert* regarding sufficiency [that] sounded a tone of optimism about juries' abilities to sort out the veracity of competing scientific evidence." *Id.*

Such disarray in the lower courts creates confusion for litigants regarding where the line is located that divides admissibility and sufficiency. It was just this sort of confusion that led to the holdings below. Much clarification would come by this Court addressing admissibility and sufficiency standards, and then mandating that lower courts state plainly the reasons for their procedural decisions, keeping admissibility and sufficiency separate. There is precedent for this.

It has long been a tradition in summary judgment cases for courts to give reasons for their decisions. *See, e.g., U.S. v. Continental Oil Co.*, 377 U.S. 161, 162 (1964) (separate op. of Harlan, J.); *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244-245 (2d Cir. 2004); and *Wildbur, supra* at 5. Similarly, appellate courts have regularly insisted that district courts make clear their bases under *Daubert* for admitting or excluding expert opinion. *Goebel, supra* at 4. Although appellate courts owe deference to trial court rulings on admissibility, no effective review can take place if lower courts do not explain the reasons for their admissibility decisions in the summary judgment context.

2. Fit, Materiality and the "Space" Between Admissibility and Sufficiency

There is good reason to suppose that it would be exceedingly rare for expert testimony to be admitted regarding all issues necessary to establish a claim for relief, yet for summary judgment to be imposed. Built into the *Daubert* and Rule 702 structure is the requirement of relevancy, which this Court defined as "fit." *Daubert*, 509

U.S. at 591. On remand in *Daubert*, the Ninth Circuit discussed this relevancy requirement as follows:

> We must ensure that the proposed expert testimony is "relevant to the task at hand," *Id.* at 2797, i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "fit" requirement. *Id.* at 2796.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (Daubert "II"). In short, if proffered expert opinion does not advance a material aspect of the party's case, it is not relevant in the first place. Admitted evidence, as a consequence, is already well on its way to satisfying Rule 56.

In *Daubert* itself, this Court also gave notice to the space between admissibility and sufficiency, while recognizing that it was not capacious. This Court assured the parties, particularly Respondent in that case, that the ruling would not lead to a "free-for-all." If the threshold admissibility requirements did not exclude bad science, this did not mean that "befuddled juries" would be "confounded by absurd and irrational pseudoscientific assertions." *Daubert*, 509 U.S. at 595. This Court explained that other procedural hurdles could guard against such pseudoscience, stating as follows:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. R. Civ. P. 50(a), and likewise to grant summary judgment.

Daubert, 509 U.S. at 596.

Clearly, this Court considered the prospect that expert evidence would be admissible but insufficient to proceed to trial to be extremely rare. Indeed, this Court's earlier statement in the same paragraph indicates what should happen in the ordinary course of the proceedings after expert testimony is deemed admissible: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

In this case, there has been no suggestion that the Petitioner's proof is "shaky" or constitutes a mere "scintilla of evidence." The district court found that Petitioner's expert testimony overcame the substantial demands of *Daubert* and was highly probative of the central concerns presented by the claim for relief. *See, e.g.*, App. 37 (defining the markets is a central issue). As a general statement of the law following a *Daubert* challenge, then, if expert testimony is found admissible by a preponderance of the evidence (*i.e.*, is relevant and reliable, and would assist the trier of fact) – and such testimony does not deviate from prevailing law and supports elements of the burden of proof (or in conjunction with other proofs) – then that testimony creates a factual dispute and is material for a jury to consider in a jury case. Such testimony is sufficient to overcome a pending motion for summary judgment.

The district court in this case found all of the Petitioner's proffered expert testimony to be admissible under *Daubert*. This holding was left undisturbed by the Seventh Circuit. Yet these courts concluded, notwithstanding admissible evidence on all issues necessary to establish a claim for relief under prevailing law, that summary judgment for the Respondents was proper. The lower

courts did not give reasons explaining why the admissible expert evidence was not sufficient to allow this case to proceed to trial. Instead, they effectively weighed the expert testimony, and chose between alternative theories offered by the experts for the respective sides, in reaching their summary disposition of this case. This was error. As the next sections demonstrate, on each and every point on which the lower courts rested their analyses, there existed admissible expert opinion that was material to aid the jury in deciding whether Petitioner had met her burdens. Unfortunately, this is not an error that merely plagues this case, but one that occurs in district courts with increasing frequency. *See generally*, Gavil, *supra* at 3-4; Rothstein, *supra* at 4.

B. The lower courts' analyses of antitrust standing and injury failed to give reasons why admitted expert testimony was insufficient for a jury to decide standing.

As a preliminary requirement, Petitioner established Article III standing. The Seventh Circuit specifically so found ("Kochert can construct a reasonable causality chain linking her injury to defendants' actions." App. 8), and the district court held that Petitioner sufficiently pled antitrust standing and injury when it denied Respondents' 12(b)(6) motions. App. 64-69. It thus became a matter of proofs to determine whether these activities were anticompetitive, enabling Petitioner to proceed to a jury on antitrust standing.

According to Areeda and Hovenkamp, the basic antitrust standing requirements that must be proven by plaintiffs are as follows: (a) injury to "business or property"; (b) injury-in-fact "by reason of" the antitrust violation [injury caused by violation]; (c) proximity [injury not

unduly remote from the violation, taking into account risk of duplicative recovery, and alternative plaintiffs]; (d) antitrust injury [injury intended to be prevented by the antitrust laws – harm to competition]; and (e) cognizable injury and reasonably quantifiable damages [taking into account whether damages were speculative and the complexity of apportioning them]. Areeda and Hovenkamp, *Standing of Private Plaintiffs*, Fundamentals of Antitrust Law, ¶ 3.01(c)-(d), at 3-7 to 3-12 (Aspen Publ. (2006 Suppl.)); *see Assoc. Gen'l Contractors v. California Council of Carpenters* ("*AGC*"), 459 U.S. 519 (1983). Petitioner's proof fully met these requirements.

As a general matter, principles of causation and proximate cause borrowed from tort law are used for antitrust standing analysis. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1996 (2006); *see Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-709 (citing to *Gorris v. Scott*, 9 L.R. Ex.-125 (1874) (7th Cir. 1984)). Contrary to what the Seventh Circuit did in this case, once sufficient allegations with supporting proofs have been presented, in a jury case, the jury determines antitrust standing. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986); *AGC*, 459 U.S. 519, 521, 545-46 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 471 (1982); *NicSand, Inc. v. 3M Co.*, 457 F.3d 534, 548-549 (6th Cir. 2006); *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1349 (Fed. Cir. 2004) (market definition and antitrust injury are factually intensive inquiries for a jury's determination) (*rev'd on other grds.*, 126 S. Ct. 980); *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 710-711 (9th Cir. 2003) (jury determines date for antitrust standing). Antitrust standing is thus no different than a garden variety tort case requiring expert

testimony, or other appropriate admissible proofs, to establish causation as an element by law. If proofs on it are lacking, then, of course, a court can determine as a matter of law that plaintiff has failed in her burden. *See, e.g., Ambrosini* at 141, *supra* at 16 (admitted testimony on causation constitutes evidence to raise questions of material fact to defeat summary judgment). But if proofs are present, as here, then a jury makes the decision.

In the instant proceeding, the appellate court stated that either the 1998 denial of renewal of Kochert's subcontract constituted a part of the anticompetitive scheme, or it did not. If it did not, it is not the starting point for the anticompetitive scheme. App. at 12. But Petitioner's expert, Seaman, used an analysis starting in 1997 (App. 89) that established a spectrum of anticompetitive behavior commencing in 1998 and culminating in 2001 (App. 91-93, 133-134, 137). Moreover, Respondents' exclusive dealing arrangement excluded Petitioner as a direct competitor and entailed the use of Respondents' market power (App. 89, 82-86, 76-78). Thus, Seaman's admitted testimony stated that in this case, 1998 was the starting point of the anticompetitive harms, and is in accord with this Court's recognition that events over time can constitute a violation of antitrust law. *Aspen Highlands v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 693-695, 699 (1962).

The appeals court, *sua sponte*, termed what occurred in 1998 as " . . . simply staffing decisions made solely by parties without market control." App. 13. Seaman, though, opined and calculated that Respondents had market control. He never testified, nor did any of Petitioner's experts, that it was a "staffing decision." App. 82-86, 76-78.

Also, the appellate court never stated what constituted market control; it simply concluded that there was no market control. Without knowing the parameters of market control for a given time period, there can never be a determination of market "as a matter of law." More importantly, market definition is for a jury to determine. *Unitherm, supra* at 21.

The appellate court further determined that Petitioner was a direct competitor, but nevertheless held that she was not an appropriate party to challenge the anti-competitive effects of the exclusive dealing scheme of the Respondents. Seaman concurred that Petitioner was indeed a competitor, but, consistent with prevailing law, categorized her as an appropriate, indeed essential, party to enforce antitrust law in the context of exclusive dealing. App. 80. ["The Areeda/Hovenkamp treatise states the rule categorically: 'a rival has clear standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude competitors from the market.' Antitrust Law 2002, ¶ 348a . . . The justification for competitor standing in exclusive dealing cases is not that exclusive dealing liability exists for the benefit of competitors. It is rather that when unlawful exclusive dealing occurs, competitors are efficient advocates of consumers' . . . interests . . . " *NicSand,* 457 F.3d at 549.]

The Seventh Circuit panel also found that Petitioner left the market in 2001. The two primary hospitals in the market merged into GLHS in 1998 and created substantial market power. They then began consolidating services, *e.g.* birthing, into a single hospital from which Petitioner was excluded. It was reasonable to foresee, as Petitioner saw, that further foreclosures of competition would occur by the actions of Respondents – which indeed took place – as

evidenced by the complete exclusion of Petitioner and other competitors to AA no later than 2001. This Court has long since recognized that competitors have standing whenever they can show that they are being excluded, whether fully or partially, in ways that harm competition, and not just the competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (n.14) (1977). ("But competitors may be able to prove antitrust injury before they are actually driven from the market and competition is thereby lessened.") Even if she left the market before 2001, Petitioner would still have had standing since Seaman's admitted testimony, combined with that offered by Minore, Gertler and Ivankovich, found adverse competitive effects as early as 1998. Hofman's damage calculations commenced in 1998 as well.

Indeed, during and after 2001, Petitioner continued to be ready, willing and able to reenter the market and thus satisfied the well-recognized "intention and preparedness" doctrine, *e.g., Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1983). *See* App. 8. Petitioner had the qualifications, licensures, physical presence in the market, and intention to practice anesthesia services full time in 2001 and thereafter. Only Respondents' exclusive dealing arrangement prevented her and other competitors from serving the market. Petitioner alone suffered damages exceeding $1.0M through 2018. App. 124. Petitioner had standing in 2001 and thereafter as well.

Furthermore, to establish antitrust injury, a litigant must show acts that reduce consumer welfare, such as through reduced quality of care, an increase in pricing, or a reduction in output. *Chicago Prof. Sports Ltd. P'ship. v. NBA*, 961 F.2d 667, 669 (7th Cir. 1992); *Consolidated Metal Products, Inc. v. Am. Petroleum Institute*, 846 F.2d

284, 291-294 (5th Cir. 1988); *Lie v. St. Joseph Hospital,* 964 F.2d 567, 570 (6th Cir. 1992); *New York Medscan LLC v. New York University School of Medicine*, 430 F. Supp.2d 140, 146, 150 (S.D.N.Y. 2006). Petitioner established anti-trust injury as early as 1998 by showing through her experts – Minore, Gertler, Seaman and Ivankovich – that competition was harmed, and thus consumers were adversely impacted, through decreased quality of care (App. 110-118, 121) (quality of care provided by the exclusive group was inimical to patient care; the conduct of the group constituted gross negligence; and the exclusive group abused the exclusive contracts it had, per Minore); 125-126 (an anesthesiologist leaving a patient unattended in an operating room deviates from standards of care for anesthesiologists and is like an airline pilot falling asleep in flight, only to awaken to land the plane, per Ivankovich); increased pricing (App. 98-99 (20% price increase, per Seaman)); App. 101 (no cost savings or efficiencies with exclusive arrangements, per Gertler) 108-109 (13-26% price increase where norm is 6%, per Gertler); and decreased output (several deponents and GLHS' consultant's report in 2004).

Moreover, motive to monopolize was established by Seaman. App. 73-75, 77-79, 83-88. (GLHS sought to reduce the risk of competition for overall services at its hospitals and AA obtained the benefit of eliminating competition from anesthesiologists.)

There was also no potential for duplicative recovery or complex apportionment of damages, because Petitioner's injury (economic loss), measured by Hofman (App. 123-124), was not passed along to others.

Petitioner, therefore, satisfied each element of standing, particularly with admitted expert testimony. *See also* App. 132-139. However, the court of appeals decided she was not a proper party to challenge Respondents' exclusive dealing scheme. This result stems from the refusal to acknowledge the testimony of Petitioner's experts who provided support for all the elements necessary to establish antitrust standing and so should have warranted presenting this issue to the jury. Without deference to this type of admitted proof, Petitioner could not demonstrate that material questions of disputed facts existed even though she was a direct competitor excluded by those with market power in markets established by admitted expert testimony, and within a class of individuals, competitors or consumers, that this Court has identified as being among those motivated to enforce the antitrust laws. *AGC*, 459 U.S. at 539, 542.

Consequently, the Petitioner finds herself in the ironic and untenable position of having proffered expert testimony that was relevant to antitrust standing, and which was admitted to prove antitrust standing, but whose suit was dismissed on the basis that she provided insufficient proof of antitrust standing. This outcome begs for explanation. Why was relevant and reliable evidence on antitrust standing not sufficient to reach a jury in this case? Before proceeding to dismiss Petitioner's case, basic principles of fairness should require courts to explain why judgment as a matter of law is proper. If a court cannot answer this elementary question, the question should be submitted to the jury for decision. That is in accord with this Court's holdings. *See Unitherm Food Systems, Inc. v. Swift-Eckrich*, 126 S. Ct. 980, 986 (2006) (citing to *Baltimore & Carolina, Inc. v. Redman*, 295 U.S. 654, 658 (1935) (courts

do not serve as replacements to juries that determine issues of fact).

C. Admitted expert testimony and other proofs contradicted the courts' findings that Petitioner had not met her burden to provide sufficient evidence.

Besides antitrust standing and antitrust injury, every other point put forth by the lower courts indicating that Petitioner did not meet her burdens of proof is contradicted by admitted expert testimony and other proofs. For example, the district court accepted Seaman's market definitions for *Daubert* purposes, but then went too far by saying they were unproven for sufficiency purposes. It also found that Petitioner did not establish GLHS' economic interest in the exclusive anesthesia dealing scheme to support an unlawful tying arrangement; yet GLHS' CEO, Eberle, specifically stated that GLHS had such an economic interest and would benefit by it. App. 128-131. The circuit court said Respondents had no market control, but allowed to stand Seaman's statement showing to the district court's satisfaction that Respondents had a monopoly in their markets. The Seventh Circuit's declaration that the exclusive dealing arrangement had not caused prices to increase above normal levels totally ignored Gertler's testimony that it did so by over 25%. In addition, the appellate court was critical of anecdotal evidence showing diminished quality of care as an indicator of harm to competition, but it did not find manifest error in the district court's conclusion that such evidence was relevant and reliable, and that any of its limitations would be tested on cross examination at trial. All this, and more, is set forth in the Appendix, at 132-139.

D. Did the trial and appellate courts below err in weighing the persuasiveness of admitted expert testimony and granting summary judgment, notwithstanding admissible expert testimony on disputed material facts that should have been submitted to a jury for decision?

While the column by column comparisons found in the Appendix at 132-139 are by no means exhaustive of all the testimony and reports provided by the experts,[7] Petitioner demonstrates with these entries that the lower courts erroneously weighed the admitted expert testimony on Petitioner's burden of proof, against expert testimony proffered by Respondents' experts, thus invading the province of the trier of fact. Moreover, this expert evidence was admitted under applicable law.

If expert testimony was insufficient to overcome summary judgment on standing and injury, as well as on every other point raised on the merits of Petitioner's claims in the district court's decision, nowhere does either the district court, or the appellate court, explain why this testimony failed to create a material fact in dispute. Both decisions also do not indicate any facts that are necessary to state a cause of action but on which the experts produced insufficient evidence. The district court merely opined that the expert testimony was not persuasive. The appellate court concluded that certain facts necessary for standing and injury were unsupported by the evidence, without ever mentioning that admitted expert testimony

[7] Seaman, for example, tendered a 300+ page report with exhibits and was deposed for nearly 12 hours over two days, in Atlanta and in Washington, DC. Minore was similarly deposed for several hours.

existed on those very facts and why it deemed that testimony insufficient.

Summary judgment ended the Petitioner's claim in this matter. Reflection upon the circumstances that anteceded this result, however, should give a sober person pause. Subsequent to an extensive *Daubert* hearing, the district court admitted all of the Petitioner's experts. This expert opinion reached all of the material facts necessary to establish a claim for relief under applicable law. Yet the court ruled that this evidence was not sufficient to survive summary judgment. This ruling was not accompanied by any explanation, by the trial or appellate courts, why admissible expert opinion regarding material facts was not sufficiently probative to create genuine issues of material fact. Instead, the courts below effectively weighed the evidence and, finding it unpersuasive by their lights, directed a finding against the Petitioner. The lower courts erred in this regard, and should have permitted this case to proceed to trial. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (recognition of Seventh Amendment right to jury trial).

CONCLUSION

For the reasons stated above, Petitioner, Carolyn G. Kochert, M.D., respectfully requests that this Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MILES J. ZAREMSKI
Counsel of Record
KAMENSKY RUBINSTEIN HOCHMAN AND DELOTT, LLP
7250 N. Cicero Avenue, Suite 200
Lincolnwood, Illinois 60712
Telephone: (847) 982-1776
Facsimile: (847) 982-1676

DAVID L. FAIGMAN
200 McAllister Street
San Francisco, California 94102-4978
Telephone: (415) 565-4739
Facsimile: (415) 565-4865

PETER C. CARSTENSEN
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, Wisconsin 53706
Telephone: (608) 263-7416
Facsimile: (608) 262-5485

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
Telephone: (202) 944-2874
Facsimile: (202) 965-0920

Attorneys for Petitioner

463 F.3d 710

United States Court of Appeals,
Seventh Circuit.
Carolyn G. **KOCHERT**, Plaintiff-Appellant,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC., et al., Defendants-Appellees.
No. 05-1196.
Argued Feb. 13, 2006.
Decided Sept. 12, 2006.

Rehearing and Rehearing en Banc Denied Oct. 6, 2006.

Miles J. Zaremski (argued), Kamensky Rubinstein Hochman & Delott, LLP, Lincolnwood, IL, for Plaintiff-Appellant.

Larry R. Fisher, Stephen R. Pennell (argued), Stuart & Branigin LLP, Lafayette, IN, *Judy L. Woods* (argued), Bose McKinney & Evans LLP, Indianapolis, IN, for Defendants-Appellees.

Before *KANNE*, *EVANS*, and *WILLIAMS*, Circuit Judges.

WILLIAMS, Circuit Judge.

In this appeal, Carolyn Kochert challenges the district court's grant of summary judgment for the defendants on Kochert's claims alleging violations of Sections 1 and 2 of the Sherman Antitrust Act. Mindful of the Supreme Court's admonition that the purpose of federal antitrust law "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market," *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993), we conclude that Kochert does not have antitrust standing, and so we affirm the judgment of the district court.

I. BACKGROUND

Carolyn Kochert, M.D., began practicing anesthesiology in Lafayette, Indiana in 1985. From 1985 to 1994, Kochert practiced at both of the hospitals in Lafayette, Home Hospital and St. Elizabeth's Medical Center ("SEMC"). In 1994, Home Hospital and defendant Anesthesia Associates entered into a contract granting Anesthesia Associates, an anesthesiology practice group, exclusive rights to provide anesthesia services at Home Hospital. It is undisputed that exclusive services arrangements between anesthesiology practice groups and hospitals are commonplace in this industry and do not inherently raise anticompetitive concerns. After being offered the contract for anesthesia services at Home Hospital, Anesthesia Associates offered anesthesiologists with privileges at Home Hospital subcontracts to provide anesthesia services at Home Hospital. Kochert received a subcontract, which was eventually extended to 1998. Although Kochert's Home Hospital subcontract was not renewed in 1998, she continued to provide anesthesia services at SEMC.

In 1998, Home Hospital and SEMC merged to form defendant Greater Lafayette Health Services ("GLHS"), which administered both hospitals. Soon thereafter, Lafayette Anesthesiologists, a practice group of which Kochert was a member, obtained an exclusive three-year anesthesiology contract at SEMC, in which Kochert participated. When this contract expired in 2001, GLHS did not renew its ties with Lafayette Anesthesiologists and instead contracted with Anesthesia Associates to provide exclusive anesthesia services at SEMC. Anesthesia Associates's contract to provide exclusive anesthesia services at both Home Hospital and SEMC has been extended several

times and the current extension terminates October 14, 2006.

Kochert claims that Lafayette Anesthesiologists was the only group "within an hour of Lafayette" that could provide a competitive check on Anesthesia Associates. Due to Anesthesia Associates's exclusive contracts, Kochert alleges that she has been unable to practice anesthesiology at Home Hospital since March 1998 and at SEMC since 2001. Kochert claims that consumer welfare decreased because of the exclusive contracts with Anesthesia Associates. For instance, she states that before Home Hospital awarded the exclusive contract to Anesthesia Associates in 1994, there were no reported problems with anesthesiologists leaving operating rooms or otherwise failing to monitor patients undergoing surgery, while such problems became commonplace after the grant of the exclusive contract to Anesthesia Associates in 1994. She also claims that the exclusive contracts increased anesthesia services prices and increased delayed surgeries due to the unavailability of Anesthesia Associates anesthesiologists. Defendants counter that short absences of anesthesiologists during surgical procedures is commonplace, and they cite a 1997 report by the American Society of Anesthesiologists that determined the "quality of anesthesia care at Home Hospital to be good."

Allegedly because of the limitations on her anesthesiology practice, Kochert began considering a practice in pain management in 1998. She received board certification in pain management in 1999, and later that year opened a pain management practice (Advanced Pain Management). By August 1, 2000, Kochert was practicing pain management full time. Kochert claims that she did not enter that field voluntarily, but rather was forced into pain

management practice due to the operation of the exclusive Anesthesia Associates contracts. She claims that she made written requests to exercise her privileges in anesthesiology at GLHS in 2002 and 2003. Kochert continues to practice pain management at Home Hospital and SEMC today.

In September 2001, Kochert brought this antitrust suit against GLHS, Anesthesia Associates, and John Walling (GLHS's CEO). She alleged that she suffered antitrust injury as a direct consequence of the defendants' actions excluding competition from the market and that the defendants exercised monopoly power in the market. To support her claims, Kochert attempted to introduce the testimony of several experts, including Dr. Bruce Seaman, an economist. Seaman opined that the relevant product market was "anesthesia services,"[1] and offered three versions of the relevant geographic market,[2] the broadest of which included Tippecanoe County and seven contiguous counties.

Defendants GLHS and Anesthesia Associates filed *Daubert*[3] motions to exclude Seaman's testimony, arguing that Seaman had (1) incorrectly defined the relevant product market, (2) used incorrect methodology in defining

---

[1] According to Kochert's brief, the relevant product is "anesthesia services in support of inpatient surgical and obstetrical services, both requiring a hospital stay of greater than 23 hours." (Pl. Brief at 15.) References to "anesthesia services" throughout this opinion are generally limited to this definition.

[2] The three versions offered were (1) Tippecanoe County, (2) Tippecanoe, Montgomery, Clinton and White Counties, and (3) Tippecanoe and its seven contiguous counties.

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

the relevant geographic market and unreliable definitions, and (3) failed to do a dynamic analysis. After extensive hearings and oral arguments regarding the *Daubert* issue, the district court admitted Seaman's expert testimony, noting that the fact that the evidence passed muster under a *Daubert* relevance and reliability analysis did "not ensure or decide whether such evidence is ultimately persuasive." The question of the evidence's persuasiveness, the district court stated, would be decided "either during summary judgment or at trial."

A month later, the district court granted summary judgment to the defendants on all counts and claims. The district court found that Kochert had no antitrust standing and had not met her burden of proving an antitrust violation. The court ruled that Kochert could not withstand summary judgment on the antitrust violation in part because she could not show that the defendants' alleged practices had produced any anti-competitive effects in the relevant geographic market.[4] Specifically, the district court held that Seaman's eight-county geographic market was too narrow for two reasons: the results of his analysis for this area did not yield results sufficient to accept his definition of the market, and Seaman's analysis ignored commercial realities of the area.

The district court also concluded that: (1) Kochert failed to demonstrate that the exclusive contract between GLHS and Anesthesia Associates constituted an unlawful tying arrangement; (2) the contract between Anesthesia Associates and GLHS did not constitute an illegal "group

---

[4] *Kochert v. Greater Lafayette Health Servs.*, 372 F.Supp.2d 509, 516 (N.D.Ind.2004).

boycott" of Kochert; (3) no reasonable trier of fact could conclude that the defendants caused actual harm to competition, or that GLHS is able to restrain trade due to its market power; (4) the defendants lacked the requisite specific intent necessary for a conspiracy to monopolize in violation of the Sherman Act; (5) *res judicata* barred Kochert's Count V group boycott claim; (6) Kochert could not succeed on her "essential facility" claim because alternative facilities are available; and (7) Kochert's Indiana state antitrust claims could not survive summary judgment.

Kochert now appeals the grant of summary judgment.

II. ANALYSIS

We review the district court's grant of summary judgment *de novo*. *In re Copper Antitrust Litigation,* 436 F.3d 782, 788 (7th Cir.2006). All facts must be construed in the light most favorable to Kochert, the non-moving party. *Id.* The district court's grant of summary judgment was proper only if there was "no genuine issue as to any material fact and . . . the moving party [was] entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Article III Standing

The defendants argue, for the first time on appeal, that Kochert lacks standing under Article III of the United States Constitution. Of course, defendants are not precluded from raising this claim because such a challenge to the court's jurisdiction may not be waived. *See FW/PBS,*

Inc. v. City of Dallas, 493 U.S. 215, 230-31, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Indeed, we "are under an independent obligation to examine [our] own jurisdiction, and standing 'is perhaps the most important of the jurisdictional doctrines.'" *Id.* (quoting *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556, (1984)) (brackets omitted). Generally, all that is required to demonstrate Article III standing is "injury in fact plus redressability." *See U.S. Gypsum Co. v. Indiana Gas Co., Inc.,* 350 F.3d 623, 627 (7th Cir.2003); *Sanner v. Bd. of Trade of City of Chicago,* 62 F.3d 918, 922 (7th Cir.1995) (stating with more specificity that "(1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision") (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)).

The defendants argue that Kochert cannot demonstrate that her injury is "fairly traceable" to their challenged conduct, and cite our *Sanner* decision, where we concluded that "soybean farmers who refrained from selling soybeans due to the depressed price of the cash market lack[ed] standing under Article III" to pursue their antitrust claims. *See Sanner,* 62 F.3d at 923. We reasoned in *Sanner* that these farmers could not establish the traceability prong of the Article III standing inquiry because the decision not to sell could have been motivated by many factors and it would be impossible to weigh the impact of the alleged violation on this omission. *See id.* at 923. Defendants analogize this to Kochert's situation by

arguing that she is incapable of demonstrating that her decision to exit the anesthesia services market was the exclusive product of their anticompetitive actions. They point to the timing of her exit from the anesthesia services market and portions of her deposition testimony suggesting that other considerations may have played a role.

We do not agree that Kochert lacks Article III standing. As discussed *infra,* the defendants have raised a significant challenge to Kochert's antitrust standing. But the Article III standing inquiry does not require Kochert to prove as much. *See, e.g., Florida Seed Co., Inc. v. Monsanto Co.,* 105 F.3d 1372, 1374 (11th Cir.1997) ("Antitrust standing requires more than the 'injury in fact' and the 'case or controversy' required by Article III of the Constitution."). A question of material fact remains as to whether Kochert suffered an injury as a result of defendants' actions since Kochert can construct a reasonable causality chain linking her injury to defendants' actions. What remains in question is whether any of defendants' actions were anticompetitive and, if so, whether the *anticompetitive actions* led to Kochert's injury. We think it more appropriate to assess these questions in the context of antitrust standing and antitrust injury.

B. Antitrust Standing and Injury

The Supreme Court has observed that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise .... as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 31

L.Ed.2d 515 (1972). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The purpose of the Act is "to assure customers the benefits of price competition." *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, et al.,* 459 U.S. 519, 538, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (discussing the legislative history). The Supreme Court has stated that the "central interest" of the Act is "protecting the economic freedom of participants in the relevant market." *Id.* We have similarly observed that "[t]he principal purpose of the antitrust laws is to prevent overcharges to consumers." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 368 (7th Cir.1987).

Given the intent of our antitrust laws, courts have developed the doctrine of "antitrust standing" and the subsidiary doctrine of "antitrust injury" in order to assure efficient use of the resources of the courts towards achieving these goals. *See generally* William H. Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445, 1446-63 (1985); *see also U.S. Gypsum Co. v. Indiana Gas Co., Inc.,* 350 F.3d 623, 627 (7th Cir.2003) (questioning the wisdom of the "antitrust standing" nomenclature in light of the potential for confusion with Article III standing). Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15(a). The Supreme Court has cautioned that this seemingly broad language must be interpreted more

narrowly in light of Congressional intent as revealed by the legislative history. *See Associated Gen. Contractors,* 459 U.S. at 529-35, 103 S.Ct. 897. Thus, "not all persons who have suffered an injury flowing from [an] antitrust violation have standing to sue under § 4." *In re Industrial Gas Antitrust Litigation,* 681 F.2d 514, 516 (7th Cir.1982). Under our precedent, "only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4." *Serfecz v. Jewel Food Stores,* 67 F.3d 591, 597-98 (7th Cir.1995) (quoting *In re Industrial Gas,* 681 F.2d at 516). Kochert must demonstrate that she meets the requirements of both antitrust injury and antitrust standing to succeed on the merits of her tying, boycott, and conspiracy claims under the Sherman Act. *See Greater Rockford Energy and Technology Corp. v. Shell Oil Co.,* 998 F.2d 391, 404 (7th Cir.1993) ("a showing of both antitrust injury and antitrust standing are necessary to proceed under § 4").

1. Antitrust Injury

The threshold question for our inquiry is whether Kochert has suffered an antitrust injury. Kochert must demonstrate that her "claimed injuries are 'of the type the antitrust laws were intended to prevent' and 'reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.'" *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150,* 433 F.3d 1024, 1031 (7th Cir.2006) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)). Kochert's cognizable injuries are variations on the theme of lost income in her anesthesia practice. We must determine whether these alleged

injuries are the result of defendants' allegedly anticompetitive acts.

But first, we must assess what anticompetitive behavior is at stake here. The parties dispute the starting point of defendants' anticompetitive acts. The most obvious point in time is 2001, when GLHS formulated its exclusive contract with Anesthesia Associates. Before this point, Lafayette Anesthesiologists had an exclusive contract with SEMC while Anesthesia Associates had an exclusive contract at Home Hospital, and, therefore, the Lafayette market was serviced by two competing anesthesia services groups. Only after GLHS contracted exclusively with Anesthesia Associates in 2001 were the doctors of Lafayette Anesthesiologists (and hence Kochert) completely foreclosed from practicing anesthesia services at either of the two Lafayette Hospitals. This time line creates an obvious problem for Kochert because the record makes clear that she was no longer a practicing anesthesiologist at this point.[5]

Recognizing this problem, Kochert argues that the real starting point of defendants' anticompetitive acts is 1998, when Anesthesia Associates declined to renew its subcontract with her. Kochert's theory is that this event set off an anticompetitive chain reaction which culminated in her complete exclusion from the Lafayette anesthesia services market in 2001. Kochert does not contend that the pre-2001 activity, viewed independently, constituted anticompetitive activity under the Sherman Act. Indeed,

---

[5] Kochert has maintained anesthesia privileges at SEMC, but the record is clear that she was practicing pain management full-time by mid-2000.

her expert, Seaman, testified at his deposition that the events in Kochert's chain prior to 2001 did not independently raise "any major anticompetitive concern." The only independent event Seaman identified as having anticompetitive effects was GLHS's 2001 discontinuation of the exclusive contract between SEMC and Lafayette Anesthesiologists. Seaman, however, also advanced Kochert's chain reaction theory of anticompetitive effects.

We agree with the district court that Kochert's chain reaction theory must be rejected. Kochert has offered no precedential support for the proposition that a court should look backward from the point of the actual anticompetitive activity in search of the genesis of the acts that eventually allowed the anticompetitive behavior to occur. Such an examination would have no logical starting point in this case. Kochert argues for 1998, which coincides with the point at which her injuries accrued, but one could just as easily argue that the starting point of the chain reaction was 1994, when Home Hospital first awarded an exclusive contract to Anesthesia Associates. But the 1994 contracting is not logically the first domino because it clearly was not part of an anticompetitive scheme. The same logic applies to the 1998 denial of renewal of Kochert's subcontract – either this act constituted a part of an anticompetitive scheme or it did not. If it did not, it is not the starting point for our examination of defendants' allegedly anticompetitive behavior.

Kochert asserts that events in an antitrust case must be viewed "not in a vacuum or in isolation, but as a continuum," and cites several cases in support of this contention, including our decision in *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655-56 (7th Cir.2002). We do not quibble with the proposition that

courts should not be myopic in their assessment of potential violations of the antitrust laws, but Kochert's reliance on this concept is misplaced in the context of the current inquiry. If she could demonstrate that the events of 1998 actually were elements of a broader anticompetitive scheme, we would be remiss if we failed to consider them in the antitrust injury assessment. But she cannot. There is no evidence that any of the events of 1998, including Anesthesia Associates's decision to deny Kochert a subcontract, were part of an anticompetitive scheme that culminated with GLHS's decision to contract exclusively with Anesthesia Associates. They were simply staffing decisions made solely by parties without market control. We have stated explicitly that "the staffing decision at a single hospital [is] not a violation of section 1 of the Sherman Act." *See BCB Anesthesia Care Ltd. v. Passavant Memorial Area Hospital Ass'n,* 36 F.3d 664, 668 (7th Cir.1994) (collecting cases).

Furthermore, the cases Kochert cites in support of her argument do not address the issue of antitrust injury as we examine it here. *In re High Fructose* discusses the need for holistic examination of a defendant's acts in the context of a court's assessment of price-fixing arrangements. *See In re High Fructose,* 295 F.3d at 655 ("The second trap to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment"). The case does not address either antitrust standing or antitrust injury. The other cases cited by Kochert are similarly inapposite. *See Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699, 82

S.Ct. 1404, 8 L.Ed.2d 777 (1962) ("(T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.") (quoting *American Tobacco v. United States,* 147 F.2d 93, 106 (6th Cir.1945)); *Aspen Highlands v. Aspen Skiing Co.,* 738 F.2d 1509, 1522 n. 18 (10th Cir.1984) (concluding that the six parts of the plaintiff's evidence of monopolization "should be viewed as a whole."); *City of Mishawaka, et al. v. American Elec. Power Co.,* 616 F.2d 976, 986 (7th Cir.1980) (concluding that the various acts of a monopoly in a "price squeezing" scheme can not be looked at in a vacuum for the purposes of determining whether there is evidence of a Sherman Act violation). Moreover, none of the plaintiffs in the cases Kochert cites attempted to introduce evidence of activity postdating their participation in the market as proof of antitrust injury. Kochert has not introduced evidence supporting the conclusion that anything other than GLHS's 2001 elimination of the exclusive contract between SEMC and Lafayette Anesthesiologists should be considered as the starting point for our antitrust injury analysis.

This conclusion brings into focus the central question in assessing Kochert's alleged antitrust injury: did GLHS's 2001 elimination of the exclusive contract between SEMC and Lafayette Anesthesiologists cause Kochert's injuries? Put another way, was this act "the cause-in-fact of the injury," or can it be said that "'but for' the violation, the injury would not have occurred"? *See Greater Rockford Energy and Technology Corp. v. Shell Oil Co.,* 998 F.2d 391, 395 (7th Cir.1993). Since Kochert was practicing pain management full-time as of August 2000, the answer to all of these questions is "no." GLHS's anticompetitive behavior in 2001 did not injure Kochert's anesthesiology practice

because it was nonexistent by this point. Kochert therefore fails to establish one necessary prong of the two-pronged test that the Supreme Court described in *Brunswick Corp.*; she cannot demonstrate that her injuries "flow[] from that which makes defendants' acts unlawful." *Brunswick Corp.*, 429 U.S. at 489, 97 S.Ct. 690. She has not demonstrated antitrust injury.

2. Antitrust Standing

Even if Kochert could establish antitrust injury, she would still fail to establish antitrust standing because she is not the party "who can most efficiently vindicate the purposes of the antitrust laws" in this case. *See Serfecz*, 67 F.3d at 598. The Supreme Court has identified six factors that courts should weigh in making this assessment:

> (1) [t]he causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) [i]mproper motive; (3) [w]hether the injury was of a type that Congress sought to redress with the antitrust laws; (4) [t]he directness between the injury and the market restraint; (5) [t]he speculative nature of the damages; (6) [t]he risk of duplicate recoveries or complex damages apportionment.

Sanner, 62 F.3d at 927 (describing factors articulated in *Associated General Contractors*, 459 U.S. at 537-46, 103 S.Ct. 897).

The fourth factor weighs particularly heavily in this case. In discussing the directness inquiry, the Supreme Court stated that "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement

diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated Gen. Contractors,* 459 U.S. at 542, 103 S.Ct. 897.

As was the case in *Serfecz,* Lafayette's anesthesia "consumers could maintain an action if defendants' actions stifled competition allowing defendants to engage in monopoly pricing in the retail [] market." *See Serfecz,* 67 F.3d at 598. These consumers, or perhaps one of the entities that is also directly affected by rises in anesthesia services prices, such as an insurer, would be a more efficient claimant. The Court's concern with opening the antitrust litigation floodgates also suggests that groups of doctors, such as the excluded Lafayette Anesthesiologists group, might serve as better plaintiffs than individual doctors like Kochert. Denying Kochert "a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *See Associated Gen. Contractors,* 459 U.S. at 542, 103 S.Ct. 897. If Anesthesia Associates and GLHS are truly manipulating the anesthesia services market in order to raise prices and drive down quality of care, these effects will not be missed by patient-consumers or insurers.

Two other factors outlined in *Associated General Contractors* that weigh against a finding of antitrust standing are addressed in the context of our antitrust injury analysis. Though Kochert is arguably a direct competitor, the causal connection between her injury and the antitrust violation is tenuous at best. Kochert has also failed to produce evidence of improper motive. She has not offered any arguments with regard to the other factors sufficient to tip the scales away from our ultimate conclusion. Kochert does not have antitrust standing.

Finally, though it is ultimately unnecessary, we note that the record is bereft of any credible evidence of the type of anticompetitive effects alleged by Kochert. Kochert's economics expert testified at his deposition that "there is no particular evidence on nominal rates that would suggest an exercise in market power." With no evidence that prices, in the normal sense, have been affected by anticompetitive activity, Kochert (and her expert) relied exclusively on her evidence of diminished quality of care as proof of anticompetitive effect, in and of itself, and as proof of higher "quality adjusted" costs. But no reasonable jury, examining Kochert's evidence of diminished quality, could find it credible as proof of such diminution. Kochert has not introduced any evidence that would allow a jury to compare the quality of care prior to defendants' anticompetitive acts with the quality of care after these acts. She has not introduced any statistical analysis focusing on measurable indices of quality, such as the number of patient complaints or mortality rates. Instead, Kochert offers expert testimony and physician affidavits which rely almost exclusively on anecdotes, such as one story about an anesthesiologist leaving an operating room momentarily to eat a sandwich, to prove diminished quality. We have serious doubts about the usefulness of Kochert's evidence. But we will not resolve this issue because it is clear that Kochert does not have antitrust standing.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

372 F.Supp.2d 509

United States District Court,
N.D. Indiana,
Hammond Division.
Carolyn G. KOCHERT, M.D., Plaintiff,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC.,
d/b/a St. Elizabeth Medical Center and
d/b/a Lafayette Home Hospital,
Anesthesiology Associates, P.C., and
John Walling, Defendants.
No. 4:01CV0027 AS.
Dec. 29, 2004.

Michael B. Brohman, Miles J. Zaremski, Ron S. Brand, Lincolnwood, IL; Randall L. Vonderheide, Lafayette, Robert P. Kinsella, Schererville, IN, for Plaintiff.

Larry R. Fisher, Stephen R. Pennell, Lafayette, IN; Andrew M. McNeil, Beth L. Riga, Judy L. Woods, Ronald E. Elberger, Indianapolis, IN, for Defendant.

MEMORANDUM AND ORDER

ALLEN SHARP, District Judge.

On September 18, 2001, Plaintiff Dr. Carolyn Kochert, M.D., filed an amended complaint in this Court alleging various antitrust violations under both federal and state laws. On April 30, 2004, Defendant Greater Lafayette Health Services, Inc. ("GLHS") filed a Motion for Summary Judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. On that same day, Defendant Anesthesiology Associates, P.C. ("AA") filed its own motion for Summary Judgment.

This case has now been pending in this Court since 2001 and, in spite of Plaintiff's counsels' protestations to

the contrary, a massive discovery effort has advanced. It is obviously the serious burden of this Court to look very carefully under Rule 56 at this record. This case has received abundant attention from this Court, including the highly qualified assistance of a United States Magistrate Judge. This Court conducted extensive proceedings in October, 2004 and entered a series of evidentiary rulings, including several challenges to expert witnesses under the Daubert standard, on or about November 15, 2004. This Court also heard oral arguments on these Motions for Summary Judgment in South Bend, Indiana for a period of over two hours on November 26, 2004.

While listening to those arguments, especially of the ones for the Plaintiff, this court could not escape the impression that either a contract case, due process case, or employment discrimination case, was being argued. The plain fact is that this case is none of the above. It is absolutely essential to revisit first principals regarding Antitrust requirements here.

When it is all said and done, and in spite of the best efforts of very able counsel, this Plaintiff has simply failed to present a jury issue under the Seventh Amendment in regards to her claims of Antitrust violation.

This Court is also aware that the bundle of rulings entered on November 15, 2004 include some limited exclusions of evidence which remain binding on the parties and which are followed here. Though the Court expressed judgments on the reliability and methodology of expert witness testimony, it did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact.

Finally, this Court is compelled to give serious notice as background and otherwise to earlier litigation spawned by Kochert in both state and federal courts. Kochert filed her first federal lawsuit in this Court in 1998 in Cause Number 4:98CV0053. She filed a complaint in the Tippecanoe Circuit Court, under Cause No. 79C01-0001-CP-0007, in January 2000. In both cases, Kochert sought to recover damages from the Defendants on various theories arising out of contract disputes with AA. In both the 1998 federal court case and the 2000 state court case, Kochert's claims against the hospital were dismissed on summary judgment.

BACKGROUND

The Plaintiff, Carolyn Kochert, M.D., first began practicing anesthesiology in Lafayette, Indiana in 1985. From 1985 to 1994, Kochert practiced anesthesia at both Lafayette Home Hospital ("HH") and St. Elizabeth's Medical Center ("SEMC"). On August 9, 1994, Defendant Anesthesia Associates ("AA") and HH entered into a contract for AA to be the exclusive provider of anesthesia services at HH. After being offered the exclusive services contract for anesthesia services at HH, AA offered each anesthesiologist with current privileges at HH a subcontract to provide anesthesia services at HH. Kochert was given such a subcontract. At some point during 1998, AA's Board of Directors voted not to renew Kochert's subcontract with AA after its expiration in February 1998. In 1998, HH and SEMC merged and GLHS took over administration of both hospitals at the end of that year. In April 1999, the labor and delivery unit at SEMC was closed. At the beginning of 2001, GLHS contracted with AA to

provide anesthesia services at SEMC beginning on June 1, 2001.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Bragg v. Navistar Int'l Trans. Corp.,* 164 F.3d 373 (7th Cir.1998). *Celotex* addressed the initial burdens of the parties under Rule 56, and *Anderson* addressed the standards under which the record is to be analyzed within the structure of Rule 56.

The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 56); *Larimer v. Dayton Hudson Corp.,* 137 F.3d 497 (7th Cir.1998). A question of material fact is a question which will be outcome determinative of an issue in the case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts shows that there is a genuine [material] issue for trial.'"

Id. The nonmoving party cannot rest on its pleadings, *Weicherding v. Riegel,* 160 F.3d 1139 (7th Cir.1998); *Waldridge v. American Hoechst Corp.,* 24 F.3d 918 (7th Cir.1994); nor may that party rely upon conclusory allegations in affidavits. *Smith v. Shawnee Library Sys.,* 60 F.3d 317, 320 (7th Cir.1995).

During its summary judgment analysis, the court must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560 (7th Cir.1996). Furthermore, it is required to analyze summary judgment motions under the standard of proof relevant to the case or issue. *Anderson,* 477 U.S. at 252-55, 106 S.Ct. 2505. Applying the above standard, this Court will now address the present motions.

DISCUSSION

I. ANTITRUST STANDING

Kochert seeks to recover damages under Section 4 of the Clayton Act, for alleged violations of Section 1 and 2 of the Sherman Antitrust Act. Both antitrust injury and standing are necessary to proceed under Section 4. *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.,* 998 F.2d 391, 395 (7th Cir.1993). "It is now well settled that in order to have standing to prosecute private antitrust claims, plaintiffs must show more than the defendants' conduct caused them an injury." *Balaklaw v. Lovell,* 14 F.3d 793, 797 (2d Cir.1994). Instead, "[p]laintiffs must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Id.; accord Indiana Grocery v. Super Valu Stores, Inc.,* 864 F.2d

1409, 1416 (7th Cir.1989). Kochert has not suffered an antitrust injury and therefore she does not have antitrust standing.

Kochert has conceded that the non-renewal of her contract in 1998 did not cause her to sustain any antitrust injury. Kochert Memo. in Opposition to Defendants' Rule 12 Motions to Dismiss at p. 35. Instead, Kochert contends that there was "a sequence of events that, when combined, creates anti-competitive concerns that might not have been present had those three events not been combined." Kochert Brief p. 7. Kochert contends that a combination of the nonrenewal of her subcontract by AA, the consolidation of the OB unit at SEMC with the OB unit at HH in April 1999, and awarding the exclusive contract to SEMC to AA in June 2001 form the basis of her antitrust claim. Kochert was no longer in the business of providing anesthesia services by June 1, 2001, however. Kochert had opened her own pain management practice and was doing pain management on a full time basis by August 1, 2000. Therefore, Kochert could not have sustained any antitrust injury which was caused by GLHS's decision to award the exclusive contract at SEMC to AA in June 2001. *See Reddy v. Good Samaritan Hosp. & Health Ctr.,* 137 F.Supp.2d 948, 967 (S.D.Ohio 2000). This fact is confirmed by Kochert's damages expert, Hoffman, who determined that all of Kochert's damages were caused by the nonrenewal of her subcontract with AA in 1998.

Furthermore, Kochert fails to establish an antitrust injury because the injury alleged was not the type of injury the antitrust laws were intended to prevent. To sustain an antitrust injury there must be more than mere harm to a competitor. Rather, there must be harm to competition. The Supreme Court has stated that the

plaintiff's injury must be "an injury caused by anti-competitive behavior as opposed to mere economic loss." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Kochert's alleged injuries are to her as a competitor, not injuries to competition.

Kochert is unable to show direct anticompetitive effects on the price, quantity or quality of anesthesia services caused by the defendants. To show an antitrust injury, Kochert must prove that the exclusive contract affected the price, quantity or quality of anesthesia services, not just her own welfare. *Davies v. Genesis Med. Ctr.*, 994 F.Supp. 1078, 1093 (S.D.Iowa 1998) The harm Kochert alleges, working more hours at SEMC and changing her specialty, is indirect and cannot be tied directly to the alleged anticompetitive acts or their effects – raising anesthesia prices and diminishing anesthesia services. Kochert did not pay for anesthesia services and was not a provider of anesthesia services at all relevant times. Thus, Kochert has not shown that she was harmed in any way by any anticompetitive effect on the price, quantity or quality of anesthesia services, even if these effects are assumed to exist.

II. KOCHERT'S TYING CLAIMS

Kochert alleges in Counts I and II of her complaint that the exclusive contract between GLHS and AA constitutes an unlawful tying arrangement which is both a per se violation of Section 1 of the Sherman Antitrust Act as well as an unreasonable restraint of trade under the rule of reason.

Kochert's allegations of a per se violation cannot survive summary judgment. This Court finds the decision of *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2, (1984) instructive on this issue. In *Jefferson Parish,* the Court concluded that a per se condemnation of exclusive anesthesia service agreements is appropriate only if there was evidence of forcing a purchaser to do something he would not otherwise do. *Id.* at 15, 104 S.Ct. 1551. Patients are not forced to purchase anesthesia services they would otherwise forego when having surgery or delivering a baby. Thus, Kochert's reliance on a per se analysis is misplaced.

Kochert's claims under the rule of reason are also deficient. In *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.,* 758 F.2d 203, 207-210 (7th Cir.1985), the Seventh Circuit held that an illegal tying arrangement would not be found where the alleged tying company has no economic interest in the sales of the tied seller.[1] AA billed its patients separately for AA's services. GLHS did not receive fees generated by AA. Any economic benefits which GLHS may have received from having exclusive contracts with AA would be indirect.[2] Therefore, Kochert's illegal tying claims must fail.

---

[1] This rule applies with equal force to a per se violation analysis. *Carl Sandburg,* 758 F.2d at 207-210.

[2] Kochert claims that GLHS billed its patients directly for anesthesia services and derived a profit from such services. Deriving a profit from the sale of supplies related to anesthesia services does not create the requisite economic interest. Eberle dep. pp. 216-226.

III. SHERMAN ACT CLAIMS

A. Group Boycott Claims

In Counts III and VIII, Kochert alleges that AA/GLHS contracts constitute a group boycott of her. Group boycotts are illegal only if used to enforce agreements that are themselves illegal. *Collins v. Associated Pathologists, Ltd.* 844 F.2d 473, 479 (7th Cir.1988) (citing *Marrese v. American Academy of Orthopaedic Surgeons,* 726 F.2d 1150, 1155 (7th Cir.1984)) en banc (rev. on other grounds, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985)). An exclusive contract between a hospital and a group of physicians to provide professional services is not illegal per se. *Collins,* 844 F.2d at 479-80. Such exclusive contracts amount to nothing more than a decision by a customer to enter into an exclusive dealing agreement with a supplier, even though the supplier's competitors are "foreclosed" from that customer for the life of the contract. *Minnesota Association of Nurse Anesthetists v. Unity Hospital,* 208 F.3d 655, 659-60 (8th Cir.2000). Indeed, every decision to purchase goods or services results in winners and losers as the decision to buy always excludes other potential suppliers. "It is perfectly permissible under the Sherman Act for one business entity to refuse to deal with another business entity." *McMorris v. Williamsport Hospital,* 597 F.Supp. 899, 912 (M.D.Pa.1984).

B. Sherman Act Section 1 Claims Based Upon Unreasonable Restraint of Trade

To meet her initial burden of proving an antitrust violation under the rule of reason in a Section 1 claim, Kochert must show that the alleged antitrust violation has produced anti-competitive effects within the relevant

product and geographic areas. This can be done in two ways. First, a plaintiff may delineate a relevant market and show that the defendant has enough market power to significantly harm competition. Second a plaintiff may demonstrate that the challenged practice has actually produced negative anti-competitive effects. *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). *Minnesota Association of Nurse Anesthetists v. Unity Hospital,* 5 F. Supp 2d. 694, 706, 707 (1998). Kochert has failed to create a genuine issue of material fact as to whether the defendants caused any actual harm to competition, or whether GLHS has sufficient market power to restrain trade in any relevant product or geographic market.

Kochert has failed to demonstrate that an exercise of market power has caused harm to competition through an increase in the price of anesthesia services. There is no evidence to suggest that anesthesia prices involved in this case have increased beyond those in Lafayette and other parts of Indiana. Kochert's own expert, Dr. Seaman, concedes that there is "no particular evidence of nominal rates that would suggest an exercise of market power." Seaman dep. p. 60. Seaman instead suggests that a decrease in quality may have had an effect on the real price, which he defines as price adjusted for quality. Seaman pp. 50-51. Therefore, Kochert must be able to show a decrease in the quality of care that occurred after the exercise of market power. This Kochert has failed to do. She makes much of incidents which she claims demonstrate a reduction in the quality of care, but fails to show that those incidents did not occur or were less prevalent before the exercise of market power. *See Minnesota Association of Nurse Anesthetists,* 5 F.Supp.2d at 707. Even if

Kochert could somehow show that the quality of care is substandard, she must still show that this reduction has occurred as a result of anti-competitive behavior. Furthermore, Kochert has failed to show that there has been actual harm to competition from a reduction in quality because patients were able to choose other hospitals and anesthesiologists within the area. *See Flegel v. Christian Hospital,* 4 F.3d 682, 688-89 (8th Cir.1993) (citing *Jefferson Parish Hospital v. Hyde,* 466 U.S. 2, 29-30, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)).

Because Kochert failed to show actual detrimental effects, she must demonstrate that the Defendants have market power within a well-defined relevant market. To show that a defendant has sufficient market power to harm competition, a plaintiff must first define the relevant product and geographic markets affected by the alleged uncompetitive activity.[3]

In defining the relevant geographic market, Kochert's expert on markets, Dr. Seaman, based his analysis on the Elzingha-Hogerty test ("E-H test"). This test calculates a LIFO, a percentage of patients who come from within the geographic area who go to GLHS, as well as LOFI, the percentage of patients from outside the geographic area who go to GLHS. The E-H test. The E-H test is used to determine whether a hypothetical geographic market is self-contained.

---

[3] The parties devote much time and energy to disputing the proper relevant product market. Even if the relevant product market is defined as anesthesia services, rather than anesthesiologists, Kochert has failed to adequately define the relevant geographic market involved, and therefore her claim cannot survive summary judgment on this point.

It seems clear that the relevant geographic market cannot be defined as narrowly as Tippecanoe County, which would leave HH and SEMC as the only hospitals in the geographic market. As noted by the Seventh Circuit in *Dos Santos v. Columbus-Cuneo-Cabrini Medical Ctr.,* 684 F.2d 1346, 1353 (7th Cir.1982) and *BCB Anesthesia Care Ltd. v. Passavant Memorial Area Hospital Association,* 36 F.3d 664, 668 (7th Cir.1994) (stating, there is "reason to doubt whether the relevant market can be sliced so small as to embrace only a single hospital"). As Judge Posner stated in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406, 1412 (7th Cir.1995), "[i]f an entire county has only 12 physicians, one can hardly expect or want them to set up competition with each other." 65 F.3d at 1412

According to Kochert's expert, Dr. Seaman, the relevant geographic market would include Tippecanoe County and the seven counties surrounding Tippecanoe County. Seaman dep. pp. 226-228. This Court finds that Kochert's attempt to define the geographic market as Tippecanoe and the surrounding counties defines the market too narrowly for two reasons.

First, Kochert attempts to average the LIFO and LOFI to reach a combined figure of 80%. Even if this averaging approach is accepted, there is no judicial precedent identified by Kochert that would allow this Court to accept a geographic market based upon a LIFO, or LOFI, or combination thereof of only 80%. *See State of California v. Sutter Health System,* 130 F.Supp.2d 1109, 1123 (N.D.Cal.2001) (LIFO and LOFI of 85% found to be insufficient); *Gordon v. Lewistown Hospital,* 272 F.Supp.2d 393,

428 (M.D.Pa.2003) (Court rejected geographic market based on LOFI of 84% and LIFO of 77.8%).[4]

Second, Kochert's analysis of the geographic market ignores the commercial realities of the Lafayette, Indiana area. A central question in determining a geographic market is "where does a potential buyer look for potential suppliers of the service – what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative services?" *United States v. Grinnell Corp.,* 384 U.S. at 588-89, 86 S.Ct. 1698; *Marshfield Clinic,* 65 F.3d at 1410. The geographic market is determined by the commercial realities faced by consumers. *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 452-56, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). Kochert's proposed geographic market includes portions of counties where residents would be required to drive an hour or more to reach Lafayette. At the same time, Kochert excluded hospitals in Logansport and Lebanon, which are roughly 45 minute drives to Lafayette, as well as hospitals in Rensselaer, Kokomo, Tipton, and Indianapolis which are only about an hour drive from Lafayette. Seaman's own data shows that a significant number of patients living within his proposed eight county area travel to other hospitals outside the area

[4] Kochert will no doubt make much of the fact that Seaman's testimony was deemed by this Court, in the context of a *Daubert* challenge, to be reliable. When that ruling was made, however, the methodology employed by Seaman and its reliability was at issue, not the results of his tests. The Order allowing Seaman's testimony, issued on or about November 15, 2004, was explicit in stating that courts have rejected LIFO and LOFI measurements similar to those offered by Kochert, while at the same time finding those expert opinions at least sufficiently reliable to warrant the courts' consideration.

as almost 24% of the persons living in Tippecanoe, Montgomery and Clinton Counties already go to hospitals in Marion County for hospital services.[5] At the end of the day, Kochert's market analysis and the economic realities of the area simply do not add up to create a sufficient antitrust claim on this issue.

If a plaintiff has successfully met her initial burden under the traditional rule of reason, the burden then shifts to the defendant to show that the GLHS contract promotes a sufficiently pro-competitive objective. *United States v. Brown University,* 5 F.3d 658, 669 (3rd Cir.1993). Even if Kochert successfully satisfied her initial burden, GLHS has demonstrated that its actions served a pro-competitive objective. The evidence demonstrates that GLHS' decision to consolidate the OB unit at SEMC with the OB unit at HH was done for legitimate business purposes to improve efficiencies, reduce costs, and improve quality of care. The number of deliveries at HH and SEMC in 1997 and 1998 led to an underutilization of the facilities and staff at those hospitals. GLHS has realized a substantial savings as a result of this consolidation.

IV. Conspiracy to Monopolize

Kochert alleges in Count IV that AA and GLHS conspired to grant AA a monopoly in the provision of hospital surgical and obstetric anesthesia in violation of Section 2 of the Sherman Act. There can be no finding of

---

[5] Although this Court stated in its November 15, 2004 Order regarding the admissibility of Seaman's testimony that Seaman did conduct a "dynamic analysis", the results of that analysis are not persuasive in light of the economic realities of the Lafayette area.

conspiracy under Section 2 of the Sherman Act unless there is "evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anti-competitive purpose." *Wagner v. Magellan Health Services, Inc.,* 121 F.Supp.2d 673, 679 (N.D.Ill.2000) (citing *Albrecht v. Herald Co.,* 390 U.S. 145, 149, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *American Tobacco Co. v. United States,* 328 U.S. 781, 809-10, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)). To establish a Section 2 conspiracy to monopolize, a plaintiff must prove: (1) a specific intent on the part of the defendants to achieve monopoly power; (2) predatory or anti-competitive conduct directed at accomplishing this purpose; and (3) a probability that the attempt will be successful. *Indiana Grocery v. Super Valu Stores,* 864 F.2d 1409, 1413 (7th Cir.1989). The evidence in this case establishes clearly that the decision to consolidate the OB unit at SEMC with the unit at HH was made unilaterally by the GLHS without any input from AA. This decision was made to reduce expenses, improve efficiency, and improve the quality of care. Therefore, the requisite specific intent was lacking. Furthermore, the facts relating to the decision not to renew Kochert's subcontract with AA have been established in the Tippecanoe County Court, and this Court may not now revisit those findings.

V. Count V Group Boycott Theory

Kochert alleges in Count V that AA's exclusive contract with HH expired in August 1996, that AA failed to renew it properly before August 1998, and that as a result, the defendants wrongly excluded her from practicing anesthesiology at HH on the basis of this ineffective agreement between 1996 and 1998.

As mentioned earlier, Kochert brought suit in state court seeking to recover damages against HH and AA because of the alleged nonrenewal of her subcontract in 1998. Summary judgment was entered in favor of HH and AA. Because there is identity of the causes of action, identity of parties and a final judgment adverse to Kochert, this count is barred by *res judicata. Roboserve, Inc. v. Kato Kagaku Co., Ltd.* 121 F.3d 1027, 1034 (7th Cir.1997). Furthermore, even if this Court were to revisit this claim, it is clearly without merit.

VI. Essential Facility Claim

Kochert alleges in Count XI that she has been denied access to practice at an essential facility, SEMC and HH, and that this refusal to grant her access to an essential facility violates Section 2 of the Sherman Act. To establish an essential facility claim, a plaintiff must show: 1) control of the essential facility by a monopoly; 2) a competitor's inability practically or reasonably to duplicate the essential facility; 3) the denial of the use of the facility to a competitor; and 4) feasibility of providing the facility. *MCI Communications Corp. v. American Telephone and Telegraph Co.,* 708 F.2d 1081, 1132-33 (7th Cir.1983), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). To establish denial, the plaintiff must show that there is no feasible alternative to the facility, and that denial to the facility would cause the plaintiff a "severe handicap," rather than simple inconvenience or economic loss. *City of Chanute, Kansas v. Williams Natural Gas Co.,* 955 F.2d 641 (10th Cir.1992).

Kochert's claims fail because of the availability of alternative facilities. According to Kochert's own expert,

Dr. Seaman, agreed that it was valid to include all surrounding counties in the relevant geographic area, and it is undisputed that there are other facilities in that area which also provide inpatient and obstetrical anesthesia services. Kochert is not foreclosed from providing anesthesia services to patients in this market. Therefore, she is unable to establish an essential element of her claim and summary judgment is appropriate.

VII. Kochert's State Antitrust Claims

Kochert's claims in Counts VI, VII, VII, IX, and X of her amended complaint are based on Indiana antitrust statutes. Because these counts are duplicative of Count I through V of her amended complaint, and because the same facts and theories relied upon by Kochert for her federal antitrust claims are relied upon in her state claims, those claims are not sufficient to withstand summary judgment.

CONCLUSION

Based on the foregoing, no genuine issue of material fact exists in regards to the claims brought by this Plaintiff and therefore such claims cannot be sustained. Summary judgment is thus **GRANTED** in favor of the Defendants and against Plaintiff on all counts and all claims. Each party will bear its own costs and fees. This is to be considered as a final appealable judgment in this case. **IT IS SO ORDERED.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., and JOHN WALLING, Defendants.	)	Cause No. 4:01CV0027 AS

MEMORANDUM AND ORDER

(Filed Nov. 15, 2004)

On July 19, 2004, Defendant Greater Lafayette Health Services, Inc. ("GLHS") filed a motion to exclude the report and testimony of Dr. Bruce Seaman, Plaintiff's expert witness on economic and market analyses for the present case. On that same day, Defendant Anesthesiology Associates, P.C. ("AA") filed their own motion to exclude the testimony of Dr. Seaman. The court has received a substantial amount of evidence and heard extensive oral arguments from counsel on this matter. This issue at this stage of the proceedings is incredibly close and is here resolved in favor of the plaintiff. It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive. It will be

necessary for this court to wade through that problem at another time, either during summary judgment or at trial.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that district judges play a "gatekeeping" role in admitting expert testimony. *Daubert* required judges to determine that scientific testimony offered under Federal Rule of Evidence 702 is both relevant and reliable. *Daubert,* 509 U.S. at 593. This requirement was extended to fields of nonscientific expertise in *Khumo Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Expert "[t]estimony is relevant if assists the trier of fact in understanding the evidence or in determining a fact at issue." *Masters v. Hesston Corp.,* 291 F.3d 985, 991 (7th Cir. 2002). To evaluate reliability, this Court "must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Id.*; *Smith v. Ford Motor Co.,* 215 F.3d 713, 719. When evaluating the reliability of expert testimony, this Court must focus "solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.,* 297 F.3d 682, 687 (7th Cir. 2002). *Daubert* sets forth a nonexclusive list of factors that a court should consider: (1) whether the theory can be and has been verified by the scientific method through testing; (2) whether the theory has been subjected to peer review; (3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community. The *Daubert* test is flexible, however, and there is no requirement that an expert's testimony satisfy each of these factors. *Id.* The framework outlined above will now be applied to Dr. Seaman's testimony.

In applying the two-step analysis required by *Daubert,* the Court must first determine whether Dr.

Seaman's testimony is relevant. *Daubert,* 509 U.S. at 593. In their motions to exclude Dr. Seaman's testimony, both AA and GLHS argue that his testimony is not relevant and would not assist the trier of fact in the resolution of the issues of this case. Both parties seem to confuse the relevance question with the reliability question, however. The subject matter of Dr. Seaman's testimony, defining the product and geographic markets, is not only relevant to this case, but is a central issue. As Defendant GLHS notes in its supporting brief, "the outcome of many antitrust cases hinges on which of the proffered markets the court ultimately accepts as the appropriate ones," and "the importance of proper market determination cannot be understated." *See* George A. Hay, *The Economist as Expert Witness, in Expert Witnesses,* 335 (Faust F. Rossi ed. 1991) ("[I]t is virtually unthinkable to attempt to litigate an anti-trust case without the use of economic testimony"). Though couched in terms of relevance, the defendants are essentially disputing the reliability of Dr. Seaman's testimony. As Kochert was proffering the testimony of Dr. Seaman to aid in defining the relevant market in the antitrust claims, Seaman's testimony would assist the trier of fact in resolving this issue.

The second step in the two-step analysis outlined in *Daubert* requires the Court to determine whether Dr. Seaman's testimony is reliable. *Daubert,* 509 U.S. at 593. As to this step of the analysis, our Court of Appeals uses two main criteria: "whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Masters,* 291 F.3d at 991. Each of those will be examined in turn.

As to Dr. Seaman's qualifications, Rule 702 permits an expert to be qualified through "knowledge, skill, experience, training or education." Neither defendant disputes Dr. Seaman's qualifications and a review of his qualifications reveals that no dispute is warranted.

The heart of the defendants' arguments focus on the methodology underlying Dr. Seaman's conclusions and the reliability of that methodology. Collectively, the defendants argue that Dr. Seaman's testimony is not based upon sufficient facts or data, is not the product of reliable principals and methods, is based on speculation, is not reasonably grounded in the record, and that the principals and methods used have not been reliably applied to the facts of this case. More specifically, they argue that (1) Dr. Seaman incorrectly defined the relevant product market; (2) Dr. Seaman used incorrect methodology in defining the relevant geographic market and that his definitions are unreliable; and (3) that Dr. Seaman failed to due a dynamic analysis. Each of these specific arguments will be addressed in turn.

The Relevant Product Market

The defendants argue that Dr. Seaman incorrectly defined the relevant product market. There are two subparts to this argument. First, the defendants claim that Dr. Seaman incorrectly defined the relevant product market as anesthesia services, rather than anesthesiologists. Second, they argue that Dr. Seaman incorrectly concluded that the relevant product market consists of three separate markets for obstetrical anesthesia, outpatient surgical anesthesia, and inpatient surgical anesthesia. These sub-parts will be discussed separately.

In his report, Dr. Seaman concluded that, "The relevant product markets are anesthesia services provided in support of inpatient surgical procedures, and anesthesia services in support of obstetrical procedures, both requiring admission into a hospital for a stay of greater than 23 hours." (Seaman Report p. 35). The defendants, relying on *Collins v. Associate Pathologists Ltd.,* 844 F.2d 473 (7th Cir. 1988), argue that in cases involving an exclusive contract between a hospital and a physician Seventh Circuit case law requires the product market to be defined as anesthesiologists and not anesthesiology services. No reading of *Collins* could lead to that conclusion. *Collins* dealt with pathologists rather than anesthesiologists – a distinction this Court finds significant. In *Jefferson Parish v. Hyde,* 466 U.S. 2, 23 (1984), the Supreme Court expressly considered a market for both anesthesiologists and anesthesiology services. The Seventh Circuit declined to recognize similar separate markets in *Collins* because, unlike anesthesiologists, there was no separate demand for pathologists. *Collins,* 844 F.3d at 477). Moreover, the Court finds it significant that the defendants do not challenge Dr. Seaman's methodology in reaching this conclusion, but rather challenge the conclusion itself. As the Seventh Circuit explained in *Smith,* 215 F.3d at 719, "[i]t is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining . . . whether the methodology underlying the testimony is sound." *See also, Deputy v. Lehman Bros., Inc.,* 345 F.3d 494, 506 (7th Cir. 2003).

Additionally, the defendants claim that Dr. Seaman erred in concluding that the relevant product market consists of three separate markets for obstetrical anesthesia, outpatient surgical anesthesia and inpatient surgical

anesthesia. The defendants rely on *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406 (7th Cir. 1995) and *Davies v. Genesis Medical Center,* 994 F. Supp. 1078 (S.D. Iowa 1998), to support this proposition. Nothing in those case indicate that the subdivision of the market by diagnostic related groups (DRGs) is so unreliable as to be excluded in a *Daubert* analysis. As noted above, one of the factors outlined in *Daubert and Khumo* for assessing the reliability of an expert's methodology is whether the method is accepted within the relevant academic community. The Plaintiff cites a paper by Zwanziger, Melnick and Eyre, "Hospitals and Antitrust: Defining Markets, Setting Standards," Journal of Health Politics, Policy and Law, Summer 1994, 19(2): 423-446:3, where "[e]mphasizing the physician as the key input into hospital treatments, Zwanziger *et al.,* would begin by grouping diagnostic groups (DRGs) into 48 'service categories' . . . essentially treating each DRG as a separate market from the demand side, this approach groups DRGs into [service categories] based on the least specialized physician capable of treating those diagnoses. Physician specialties are used as 'markers,' which in effect, identify that range of DRGs that an uncommitted hospital entrant could easily produce with the same personnel and equipment." Sacher and Silvia, "Antitrust Issues in Defining the Product Market for Hospital Services," *International Journal of Economics of Business,* v5, n2 (July 1998): 181-202. Furthermore, the defendants' economist Dr. Eisenstadt conceded that obstetrics and inpatient surgical anesthesia could be a relevant market "if plaintiff can demonstrate . . . that GLHS would not recruit a replacement group to competitively discipline AA should it attempt the exercise of market power." (Eisenstadt report pp. 24-25). He further conceded that he is unaware of any

such replacement group being imported into a local area from afar and that such a replacement might to up to a year to effectuate. (Eisenstadt 12/2/03 Dep. at p. 128). This evidence demonstrates that Dr. Seaman's methodology in defining the relevant product market is sufficiently reliable.

The Relevant Geographic Market

The defendants argue that Dr. Seaman incorrectly defined the relevant geographic market. Dr. Seaman used the Elzinga-Hogarty test ("E-H test") as the basis for defining the relevant geographic market. The test consists of two measurements – Lifo and Lofi. A Lofi or "little out from the inside" statistic represents the percentage of patients in an area's hospital who reside in the area, rather than outside the area. *See Rockford Memorial Corp.* 717 F. Supp. 1251, 1266 (N.D. Ill. 1989). This measurement is used to determine "whether a substantial number of patients from outside the area travel into an area for hospitalization," and, "[i]f so, that implies that hospitals located in the areas where those immigrating patients reside could act as a check on the exercise of market power by hospitals in the area." *Id.* (internal citations omitted). A "Lifo" or "little in from out" statistic represents the "percentage of hospital patients from a particular area who remain in that area for hospital services." *Id.* This measurement is used to determine "whether patients in a particular area make substantial use of hospitals outside the area," and "[i]f so, that implies that hospitals outside the area could act as a check on the exercise of market power by hospitals inside the area." *Id.* (internal citations omitted).

The defendants recognize that the E-H test is an appropriately reliable test for determining the relevant geographic market. However, they claim that Dr. Seaman did not properly apply the test and that the results of his application are not reliable. The defendants claim that Dr. Seaman failed to define a relevant geographic market whose Lifo and Lofi measurements are at least 90%, and that this failure is critical. The Court disagrees, and finds the language of *Rockford* instructive on this issue. The court in *Rockford,* referring to the 90% standard, stated, "[t]his guideline, however, other than setting general parameters, is of minimal utility." *Id.* at 1271-1272. The court further stated that "it is not wise or necessary to begin every new Elzinga-Hogarty inquiry with a specific percentage in mind. (For instance, the 90% figure is merely a preference)." *Id* at 1272. Finally, the court stated that "if reaching the 90% Lifo/Lofi figures is unrealistic, using a smaller percentage is no sin. The Elzinga-Hogarty test should be driven by common sense and not the other way around." *Id.* The Court also finds it significant that the cases cited by the defendants to support this argument did not involve *Daubert* challenges.[1] The courts in those cases clearly found E-H test results of below the 90% standard sufficiently reliable for consideration, if ultimately unpersuasive.

Furthermore, Dr. Seaman was able to demonstrate that his measurements would be acceptable within the

---

[1] *Federal Trade Commission v. Freeman Hospital,* 69, F.3d 260 (8th Cir. 1995); *Federal Trade Commission v. Tenet Healthcare Corp.,* 186 F.3d 1045 (8th Cir. 1999); *California v. Suter Health System,* 130 F. Supp.2d 1109 (N.D. Cal., 2001); *Gordon v. Lewistown Hospital,* 272 F.Supp.2d 393 (MD Pa. 2003).

academic community. Dr. Seaman noted in his report that "economists have generally been very critical of judicial exceptions to the general finding of localized hospital service markets in several hospital merger cases. (Seaman report p. 47). Kochert also points out that economists have accepted relatively large geographic markets in comparison to the courts. She cites a journal article, Frech III, Langenfeld and McCluer, *Antitrust Law Journal* 71 (2004), which stated:

> Economic research literature on hospital competition tends to support this type of market definition. In analyzing hospital competition, researchers often use fairly small pre-defined areas, such as counties or SMSA's . . . Sometimes, they have used pure distance measures from the merging hospitals, with radiuses in the 10 to 20 mile range. Despite the research, the court decisions issued in the last several years have found much larger geographic markets.

The *Daubert* test requires that the expert's methodology is reliable and accepted within the relevant academic or scientific community, not that the results of that methodology are ultimately persuasive to the courts. *See Daubert,* 509 U.S. 579; *Smith v. Ford Motor Co.,* 215 F.3d 713, 718 (7th Cir. 2000) ("the court's gatekeeping function focuses on an examination fo the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment").

Finally, in addition to satisfying the *Daubert* factor of being accepted within the relevant academic community,

Dr. Seaman's analysis is sufficiently objective to be challenged by the defendants. *Khumo,* 526 U.S. at 149 (the factors for assessing the reliability of expert testimony include whether the technique can be tested). In other words, the E-H test, as used by Dr. Seaman, is sufficiently objective so that the results of its applications may be tested and challenged by the defendants. It is not a purely subjective, conclusory approach that cannot be assessed for reliability.

The defendants also claim that Dr. Seaman's testimony is unreliable because he made no attempt to calculate the hospital's service area using patients' zip codes, instead aggregating the data by county. The defendants argue that aggregating the data by county is less accurate and less precise than using zip codes. *Daubert* does not require the most accurate or most precise methodology possible to be applied, but rather that the methodology that is applied is accurate. *See Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests yield reliable results). As Kochert points out, however, economic literature demonstrates that Dr. Seaman's approach, if not the absolute best approach, is at least reliable. She points to the Wilder and Jacobs study ("Antitrust Considerations for Hospital Mergers: Market Definition and Market Concentration," in R. Scheffler and L. Rossner, eds., *Advances in Health Economics and Health Services Research 7* (1987)). That study examined markets at the county level of aggregation using the E-H Lifo and Lofi rules. Another article, Morrisey, Sloan & Valvona, in "Defining Geographic Markets for Hospital Care," *Law and Contemporary Problems,* v. 51, n2 (Spring 1989): 174, cites the

Wilder and Jacobs study and states, "Wilder and Jacobs were the only analysts to explicitly compare their market to the conditions of market definition found in the economics literature." The plaintiff also cites Luft and Maerki ("Competitive Potential of Hospitals and the Neighbors," *Contemporary Policy Issues* (1984-85), who, according to Morrison, *et al.,* "made the most extensive examination of the geographic market for hospital care and the effects of concentration to date," (*Id.* at 174), but neither zip codes nor counties were used as the primary unit of their analysis. Similarly, Frech III *et al.,* (2004, cited above) discuss the possible use of an "expanding radius approach" in the application of the Elzinga-Hogarty analysis. These articles demonstrate that the zip code approach is not the only acceptable method in calculating a hospital's service area.

Dynamic Analysis

The defendants claim that Dr. Seaman's testimony is unreliable because he failed to do a dynamic analysis. Both Kochert and the defendants recognize that a dynamic analysis is a necessary step in defining the relevant geographic market. *See Freeman,* 69 F.3d at 269. The question is whether Dr. Seaman did indeed perform an acceptable dynamic analysis. The Court is persuaded that Dr. Seaman did perform a dynamic analysis.

The E-H test results in a static, rather than dynamic, picture of the geographic area. It describes patients' actual, current practices, and fails to account for where patients could practically turn for alternative sources of the relevant product if faced with anti-competitive behaovior. The result is an incomplete market analysis. Dr. Seaman, however, recognized that other hospitals would

be alternatives to GLHS and AA. (Seaman 01/28/04 Dep. p. 279-281). He did not agree with the defendants as to which hospitals offered viable alternative suppliers of comparable quality. Dr. Seaman explained that his determinations were motivated by an effort to avoid the so-called "cellophane fallacy" of incorrectly finding alternative suppliers to be effective competitors only because the quality adjusted price had risen substantially. (Seaman 1/28/04 Dep.p. 247. *See U.S. v. E.I.U. du Pont de Nemours & Co.,* 351 U.S. 377 (1956); *U.S. v. Eastman Kodak Co.,* 63 F.3d 95 (2d. Cir. 1995). Again, the defendants are free to challenge Dr. Seaman's conclusions about the relevant geographic area through "[v]igorous cross-examination [and] presentation of contrary evidence." *Daubert,* 509 U.S. at 595.

Conclusion

After carefully reviewing the evidence on this issue, including the many submissions by the parties and extensive oral arguments, the Court finds that the Testimony of Dr. Bruce Seaman is sufficiently relevant and reliable to meet the evidentiary standards set forth in *Daubert and Khumo Tire.* Therefore, the motions by defendants GLHS and AA to exclude the testimony of Dr. Bruce Seaman are **DENIED**.

SO ORDERED.

Date: November 15, 2004

s/ Allen Sharp
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., and JOHN WALLING, Defendants.	) Cause No. 4:01CV0027 AS

MEMORANDUM AND ORDER

(Filed Nov. 15, 2004)

On July 19, 2004, Defendant Greater Lafayette Health Services, Inc. ("GLHS") filed a motion to exclude the report and testimony of Paul Gertler (Gertler), Plaintiffs expert witness on contractual arrangements and their effect on pricing for the present case. On that same day, Defendant Anesthesiology Associates, P.C. ("AA") filed their own motion to exclude the testimony of Gertler. The court has received a substantial amount of evidence and heard extensive oral arguments from counsel on this matter. After careful consideration of this issue the Court resolves it in favor of the Plaintiff. It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive. It will be necessary for this court to wade through that

problem at another time, either during summary judgment or at trial.

The defendants argue that Gertler's testimony should be excluded because it (1) is irrelevant and will not assist the trier of fact to determine a fact at issue in this case, (2) fails to meet the reliability tests set forth in *Daubert,* and (3) is not based on any facts or data applicable to this case.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the Supreme Court held that district judges play a "gatekeeping" role in admitting expert testimony. *Daubert* required judges to determine that scientific testimony offered under Federal Rule of Evidence 702 is both relevant and reliable. *Daubert,* 509 U.S. at 593. This requirement was extended to fields of nonscientific expertise in *Khumo Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Expert "[t]estimony is relevant if assists the trier of fact in understanding the evidence or in determining a fact at issue." *Masters v. Hesston Corp.,* 291 F.3d 985, 991 (7th Cir. 2002). To evaluate reliability, this Court "must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Id.*; *Smith v. Ford Motor Co.,* 215 F.3d 713, 719. When evaluating the reliability of expert testimony, this Court must focus "solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.,* 297 F.3d 682, 687 (7th Cir. 2002). *Daubert* sets forth a nonexclusive list of factors that a court should consider: (1) whether the theory can be and has been verified by the scientific method through testing; (2) whether the theory has been subjected to peer review; (3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community. The *Daubert* test is flexible, however, and

there is no requirement that an expert's testimony satisfy each of these factors. *Id.* The framework outlined above will now be applied to Gertler's testimony.

Relevance

In applying the two-step analysis required by *Daubert,* the Court must first determine whether Gertler's testimony is relevant. Expert "[t]estimony is relevant if assists the trier of fact in understanding the evidence or in determining a fact at issue." *Masters,* 291 F.3d at 991. In this case, Gertler's testimony is relevant. It will aid the trier of fact in arriving at a decision of whether exclusive contracts increased pricing, improved efficiencies or heightened quality of care provided patients by the anesthesiologists within the exclusive group. *See Smith v. Ford Motor Co.,* 215 F.3d 715, 721 (7th Cir. 2000) ("in order for an expert's testimony to qualify as 'relevant' under Rule 702 it must assist the jury in determining *any* fact at issue in the case . . . the expert's testimony need not relate to the ultimate issue in order to be relevant under Rule 702") (emphasis in original). As for the effectiveness of Gertler's testimony or the results of those theories, those are not the proper subjects of a *Daubert* challenge.

Reliability

The second step in the two-step analysis required by *Daubert* requires the Court to determine whether Gertler's testimony is reliable. *Daubert,* 509 U.S. at 593. As to this step of the analysis, our Court of Appeals uses two main criteria: "whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Masters,* 291 F.3d at 991. The

defendants do not dispute Gertler's academic credentials, general experience or expertise, but instead focus on the reliability of the theory set forth in Gertler's paper. The defendants make much of the fact that Gertler's paper has not been published or peer reviewed. The factors outlined in *Daubert* are not exclusive or dispositive, however, and the "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Khumo,* 526 U.S. at 151. As Kochert points out, Gertler has presented the article in front of the following: the FTC, the American Economic Association, the Conference on Industrial Organization and Market Structure in Healthcare in Rochester, the annual meetings of the Health Economics Association, Harvard University, MIT, Princeton, Yale, Cornell, Carnegie Mellon, University of Chicago, Northwestern, UCLA, University of California Berkeley, University of Duluth, at the European Industrial Organization meetings, at the Latin American Econometric Society Meetings, at the University of San Adres in Argentina, and at the Vargas Institute in Rio de Janeiro (Gertler Dep. at pp. 12-13). Gertler stated that "the comments [to his article presented at conferences] by and large were very favorable, supportive and suggested further analyses to check the robustness of the results." (Gertler Dep. at p. 14). That Gertler's paper has not been published or subjected to peer review is not fatal to his testimony. The Supreme Court stated in *Daubert* that "some propositions are too particular, too new, or of too limited interest to be published." 509 U.S. at 593-4 (1993). At least one federal court has held that, "presentation of papers at conferences and conventions subjects the contents of those presentations and the opinions expressed therein [to] peer review." *U.S. v. Everrett,* 972 F.Supp. 1313, 1324 (D. Nev. 1997).

Furthermore, it is clear from Gertler's deposition testimony that his theory and paper were developed independently litigation. As the court stated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995), "that an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." (citing Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom 206-09 (1991) (describing how the practice of expert-shopping leads to bad science)). These factors lead the Court to conclude that Gertler's testimony is reliable.

Testimony Based on Facts or Data Applicable to the Case

The defendants' final argument is that Gertler's testimony should be excluded because it is not based on facts or data applicable to the case. They point out that Gertler has not studied the Lafayette, Indiana market and that his paper does not address that area. As the defendants' recognize in their brief, however, Gertler did use information regarding the demographic makeup of Tippeacanoe County and the counties contiguous to Tippeacanoe County. Gertler obtained this information from the Bureau of Census (Gertler Dep. at p. 28) and concluded that the area was not a metropolitan statistical area and that there was not a larger number of hospitals in the area. (Gertler Dep. at p. 28). *See Clinchfield R. Co. v. Lynch,* 784 F.2d 545, 553-54 (4th Cir. 1986) (affirming admission of economist's expert testimony based on census data). Furthermore, as Gertler explained in his deposition, he did not need to know highly specific information about the area,

but only whether there existed a fully integrated organizational form. That is, whether GLHS consisted of a large not-for-profit teaching hospital in a large statistical area which buys a physician group and makes those physicians its employees, so that there is no separation. (Gertler Dep. at p. 157). If knowing that specific information would not have affected his opinions, it cannot be essential that he obtain that information.

Conclusion

After carefully reviewing the evidence on this issue, including the many submissions by the parties and extensive oral arguments, the Court finds that the Testimony of Paul Gertler is sufficiently relevant and reliable to meet the evidentiary standards set forth in *Daubert and Khumo Tire*. Therefore, the motions by defendants GLHS and AA to exclude the testimony of Paul Gertler are **DENIED**.

SO ORDERED.

Date: November 15, 2004 /s/ Allen Sharp
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., and JOHN WALLING, Defendants.	) Cause No.) 4:01CV0027 AS

MEMORANDUM AND ORDER

(Filed Nov. 15, 2004)

On July 19, 2004, Defendant Anesthesiology Associates, P.C. ("AA") filed a motion to exclude the report and testimony of Dr. Stephen Minore. Plaintiff retained Dr. Minore for the purpose of explaining the meaning of ASA standard I and to opine on the issues of quality of care. The court has received a substantial amount of evidence and heard extensive oral arguments from counsel on this matter. After careful consideration of this issue the Court resolves it in favor of the Plaintiff. It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive. It will be necessary for this court to wade through that problem at another time, either during summary judgment or at trial.

The defendant argues that Dr. Minore's testimony should be excluded because it fails to meet the reliability tests set forth in *Daubert* and his opinions do not aid the fact finder.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that district judges play a "gatekeeping" role in admitting expert testimony. *Daubert* required judges to determine that scientific testimony offered under Federal Rule of Evidence 702 is both relevant and reliable. *Daubert,* 509 U.S. at 593. This requirement was extended to fields of nonscientific expertise in *Khumo Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Expert "[t]estimony is relevant if assists the trier of fact in understanding the evidence or in determining a fact at issue." *Masters v. Hesston Corp.,* 291 F.3d 985, 991 (7th Cir. 2002). To evaluate reliability, this Court "must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Id.*; *Smith v. Ford Motor Co.,* 215 F.3d 713, 719. When evaluating the reliability of expert testimony, this Court must focus "solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.,* 297 F.3d 682, 687 (7th Cir. 2002). *Daubert* sets forth a nonexclusive list of factors that a court should consider: (1) whether the theory can be and has been verified by the scientific method through testing; (2) whether the theory has been subjected to peer review; (3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community. The *Daubert* test is flexible, however, and there is no requirement that an expert's testimony satisfy each of these factors. *Id.* The framework outlined above will now be applied to Gertler's testimony.

Application of the standards outlined in *Daubert* requires the Court to determine whether Gertler's testimony is reliable. *Daubert,* 509 U.S. at 593. As to this step of the analysis, our Court of Appeals uses two main criteria: "whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Masters,* 291 F.3d at 991. AA does not dispute Dr. Minore's qualifications, background or experience. AA does, however, claim that Dr. Minore's testimony is not reliable. Specifically, AA argues that Minore used the ASA report and other data in an unacceptable manner, distorted and misapplied the data, has not adequately investigated the issues in the case, lacks firsthand knowledge of incidents on which he bases his opinion, and is unfamiliar with the testimony of other witnesses.

Kochert claims that the purpose of Dr. Minore's testimony is to explain the meaning of ASA Standard I and to opine on the issues of quality of care. Dr. Minore is a full-time anesthesiologist who has also testified in several cases. Dr. Minore reviewed the ASA report, depositions and affidavits, and opined as to what should have been done for quality of care or quality assurance programs. The Seventh Circuit has affirmed the admission of testimony by a physician as to the standard of care required in the medical field, even when the physician witness had limited knowledge of the practitioners in question. *Cooper v. Eagle River Memorial Hospital Inc.,* 270 F.3d 456, 463 (7th Cir. 2001). In Cooper, the witness in question was a physician who testified as to the standard of care required of nurse practitioners. That physician's role was largely administrative and the court recognized that the physician had only limited experience with nurse practitioners.

Nevertheless the court affirmed the admission of her testimony, stating that "[t]rial judges have broad discretion in determining expert qualifications and their determination will be affirmed unless it is manifestly erroneous." *Id.* The court further noted that the opponent of the testimony could "quarrel with the conclusions reached by [the physician], but her qualifications are not so limited" as to require exclusion of her testimony. *Id. See also Schneider v. Fried,* 320 F.3d 396, 407 (3d Cir. 2003). (finding the testimony of a physician reliable even though he was not an expert in the sub-specialty about which he opined; and noting the witness's academic background and his teaching).

Furthermore, AA's objections to the testimony of Dr. Minore go to the weight of his testimony and not the reliability of that testimony. *See Boyar v. Korean Airlines,* 954 F. Supp. 4 (D.C. Cir. 1996) ("[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparisons, other contentions that the assumptions are unfounded go to weight, not admissibility of the testimony"). A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *U.S. v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074 (5th Cir. 1996). As the court in *Daubert* stated, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking

shaky but admissible evidence. 509 U.S. at 595. Dr. Minore's testimony appears to the Court to be more than mere "subjective belief or unsupported speculation." *Deimer v. Cincinnati Sub-Zero Prods., Inc.,* 58 F.3d 341, 344 (7th Cir. 1995). Any inconsistencies between his opinions and the evidence he reviewed or failed to review can be explored on cross-examination.

Finally, even if Dr. Minore failed to review the testimony of other witnesses his testimony should not be excluded. *See Walker v. Soo Line,* 208 F.3d 581, 591 (7th Cir. 2000) (if there was reason to believe that the expert witness's investigation was shoddy, the opponent of that testimony could have uncovered those flaws through cross-examination and the presentation of contrary evidence); *Westberry v. Gislaved Gummi,* 178 F.3d 257, 265 (4th Cir. 1999) (alternative causes normally affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony). It appears from the evidence that Dr. Minore did review a sufficient amount of evidence, and any failure to review testimony of other witnesses does not render his testimony unreliable.

Conclusion

After carefully reviewing the evidence on this issue, including the many submissions by the parties and extensive oral arguments, the Court finds that the Testimony of Dr. Minore is sufficiently relevant and reliable to meet the evidentiary standards set forth in *Daubert* and *Khumo Tire.* Therefore, the motion by AA to exclude the testimony of Dr. Minore is **DENIED**.

SO ORDERED.

Date: November 15, 2004 /s/ ALLEN SHARP
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., and JOHN WALLING, Defendants.	) Cause No. 4:01CV0027 AS

MEMORANDUM AND ORDER

(Filed Nov. 15, 2004)

On July 19, 2004, Defendant Anesthesiology Associates, P.C. ("AA") filed a motion to exclude the report and testimony of Cornelius A. Hofman ("Hofman"). Plaintiff retained Hofman as a damages expert. The court has received a substantial amount of evidence and heard extensive oral arguments from counsel on this matter. After careful consideration of this issue the Court resolves it in favor of the Plaintiff. It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive. It will be necessary for this court to wade through that problem at another time, either during summary judgment or at trial.

The defendant argues that Hofman's testimony should be excluded because it irrelevant and premature and fails to meet the reliability tests set forth in *Daubert.*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the Supreme Court held that district judges play a "gatekeeping" role in admitting expert testimony. *Daubert* required judges to determine that scientific testimony offered under Federal Rule of Evidence 702 is both relevant and reliable. *Daubert,* 509 U.S. at 593. This requirement was extended to fields of nonscientific expertise in *Khumo Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Expert "[t]estimony is relevant if assists the trier of fact in understanding the evidence or in determining a fact at issue." *Masters v. Hesston Corp.,* 291 F.3d 985, 991 (7th Cir. 2002). To evaluate reliability, this Court "must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Id.*; *Smith v. Ford Motor Co.,* 215 F.3d 713, 719. When evaluating the reliability of expert testimony, this Court must focus "solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.,* 297 F.3d 682, 687 (7th Cir. 2002). *Daubert* sets forth a nonexclusive list of factors that a court should consider: (1) whether the theory can be and has been verified by the scientific method through testing; (2) whether the theory has been subjected to peer review; (3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community. The *Daubert* test is flexible, however, and there is no requirement that an expert's testimony satisfy each of these factors. *Id.* The framework outlined above will now be applied to Hofman's testimony.

In applying the two-step analysis required by *Daubert,* the Court must first determine whether Hofman's testimony is relevant. *Daubert,* 509 U.S. at 593. In its motion to exclude Hofman's testimony, AA argues that his testimony is not relevant because the issue of damages is irrelevant and premature at this stage of the proceeding and Hofman's analysis does not aid the trier of fact. Hofman was retained by the plaintiff to testify regarding the damages Kochert purportedly sustained as result of the actions which gave rise to her claims in this case. Kochert is required, even at the summary judgment stage, to show that she has suffered damages. To survive summary judgment, Kochert must demonstrate under Federal Rule of Civil Procedure 56 that a question of material fact exists as to her injuries. Furthermore, Kochert has demonstrated that Hofman's calculations include dates after June 1, 2001, making them relevant even if the Court accepts that date as the commencement of Kochert's action. Therefore, the issue of damages is relevant to the issues in this case.

The second step in the two-step analysis outlined in *Daubert* requires the Court to determine whether Hofman's testimony is reliable. *Daubert,* 509 U.S. at 593. As to this step of the analysis, our Court of Appeals uses two main criteria: "whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable." *Masters,* 291 F.3d at 991. AA claims that Hofman is not a qualified expert in the area of damages. Rule 702 requires that an expert be qualified through "knowledge, skill, experience, training, or education." Hofman has an MBA from the University of Chicago in Economics and Finance, has experience in economic consulting, and has given several presentations

and lectures on topics in economics and finance. In Hofman's case, his education, experience, and training are sufficient to qualify him as an expert under Rule 702.

AA also argues that the methodology underlying Hofman's opinions is unreliable. AA claims that Hofman's damage calculation was based on a novel and unsupported approach, is conclusory, and contains legal opinions masquerading as expert testimony. Specifically, AA argues that Hofman overstated the expenses Kochert incurred in opening her pain practice, failed to make an overall assessment of Kochert's entire financial situation, and uses only one year of data. While these claims might call into question the weight to be given to Hofman's testimony, they do not demonstrate that his methodology was unreliable. *See Walker v. Soo Line,* 208 F.3d 581, 591 (7th Cir. 2000) ("if there was reason to believe that [the expert witness's] investigation was shoddy, [plaintiff] could have uncovered those flaws through cross-examination and through presentation of contrary evidence"). Additionally, Hofman's deposition testimony demonstrates that he did consider data beyond 2001. (Hofman Dep. pp. 89-90, 149). Hofman's approach does not seem particularly novel. As the court recognized in *Garcia v. Columbia Medical Center of Sherman,* 996 F. Supp. 617, 623 (E.D. Tex. 1998), "[i]t is a commonly accepted practice in the field of economics to calculate future lost earnings based upon a worker's work-life probability and then adjust these figures for growth and inflation." The Court reiterates that a *Daubert* challenge is not a substitute for an adversary proceeding. As the court in *Daubert* stated, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. 595.

Conclusion

After carefully reviewing the evidence on this issue, including the many submissions by the parties and extensive oral arguments, the Court finds that the Testimony of Hofman is sufficiently relevant and reliable to meet the evidentiary standards set forth in *Daubert and Khumo Tire*. Therefore, the motion by AA to exclude the testimony of Hofman is **DENIED**.

SO ORDERED.

Date: November 15, 2004 /s/ ALLEN SHARP
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D., Plaintiff,	)	
v.	)	Civil No. 4:01cv0027AS
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the court on the Defendants', Greater Lafayette Health Services Inc. (Hereinafter referred to as "GLHS"), John Walling, Anesthesiology Associates, P.S. (Hereinafter referred to as "AA") and Dr. Kenneth Bochenek, various motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. Jurisdiction is conferred upon this court pursuant to 28 U.S.C. §§ 1331; 1337(a). For the following reasons the Defendants' motions are now **DENIED.**

I. BACKGROUND

The Plaintiff, Dr. Carolyn Kochert, has alleged that GLHS, Walling, AA and Dr. Bochenek have engaged in the following unlawful acts: conspiracy to restrain trade,

monopolization, group boycott/exclusive dealing, essential facility and tying. In her amended complaint she seeks damages and injunctive relief for these acts under the Sherman Antitrust Act, 15 U.S.C. §§ 1; 2, Clayton Antitrust Act, 15 U.S.C. § 4 and under Indiana state law, specifically Ind. Code §§ 24-1-2-(1-2).

Dr. Kochert is a board certified anesthesiologist licensed to practice medicine in the state of Indiana. (Plaintiff's Amended Complaint at ¶ 7). She has resided and practiced in Lafayette, Indiana since 1985. (Id.). The Defendant, GLHS, is the parent company of Lafayette Home Hospital and St. Elizabeth Medical Center. (P's Amend. Compl. at ¶ 13). Dr. Kochert has practiced at both of these hospitals in some capacity or another since 1985 and she currently has clinical privileges at both hospitals. (P's Amend. Compl. at ¶ 7). John Walling was the president and chief executive officer of GLHS at all relevant times to this suit.

Walling has for several years entered into an exclusive agreement with the Defendant Dr. Kenneth Bochenek, M.D. on behalf of his group anesthesia group, AA, to provide anesthesia services to GLHS. (P's Amend. Compl. at ¶¶ 16-17). The gravamen of Dr. Kochert's complaint is that in seeking these exclusive agreements with AA, GLHS has failed to notify or invite any of the other anesthesia groups or practicing anesthesiologists to submit bids or proposals to provide the anesthesia services to the hospitals controlled by GLHS. In turn, she alleges, this exclusive agreement has led to the elimination of almost half of the market for anesthesiology providers in a hospital setting, reduced consumer choice and increased costs to an anti-competitive level.

II. STANDARD OF REVIEW

The appropriate standard of review at the motion to dismiss stage requires the court to accept the factual allegations contained in the complaint as true. *Sanner v. Board of Trade of City of Chicago,* 62 F.3d 918, 925 (7th Cir.1995). "Adjunct to this principle is the requirement that [the court] view those allegations in the light most favorable to the plaintiff and make all reasonable inferences in [her] favor." *Sanner,* 62 F.3d at 925. Moreover, "... the defendant cannot, in presenting its 12(b)(6) challenge, attempt to refute the complaint or to present a different set of allegations." *Id.* This standard is not altered by a motion to dismiss under Rule 12(b)(1). *Sanner* at 925. The court must accept the Plaintiff's factual allegations and resolve any doubts in her favor. *Id.*

III. DISCUSSION

The underlying premise of the antitrust laws is to protect competition rather than to protect an individual competitor or competitors from the effects of competition. See *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 125 (1969); *Brillhart v. Mutual Medical Ins., Inc.,* 768 F.2d 196 (7th Cir.1985). This underlying premise makes sense in that the purpose of the antitrust laws were enacted to promote competition and not to provide some private cause of action for an individual competitor that failed to sell his product, successfully win an exclusive contract or to guarantee every competitor tenure in the marketplace. See *Great Escape, Inc. v. Union City Body Co.,* 791 F.2d 532 (7th Cir.1986). "The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem." *Chicago Professional Sports, Ltd.*

Partnership v. National Basketball Association, 95 F.3d 593, 597 (7th Cir. 1996). However, these determinations are highly fact sensitive. *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 482, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); *FTC v. Tenet Health Care Corp.,* 186 F.3d 1045, 1052 (8th Cir.1999); see also *Crounse Corp. v. ICC,* 781 F.2d 1176, 1188 (6th Cir.1986).

In *Jefferson Parish Hospital Dist.No.2 v. Hyde,* 466 U.S. 2, the Supreme Court was called upon to determine whether an exclusive contract between a hospital and an anesthesia group constituted an unlawful tying claim in violation of the Sherman Antitrust Act. It is important to note that the Court's ruling on both the per se violation as well as the rule of reason violation involved a well developed factual record. That record included an analysis of the percentage of patients who used the Defendant hospital as well as the percentage of patients using other hospitals in the relevant market. *Id.* at 26-27. The court concluded that Hyde had failed to come forward with any showing of an actual adverse effect on competition. *Id.* at 31.

Here the Plaintiff's Amended Complaint is replete with allegations that the Defendants' illegal conduct has an adverse effect upon competition both for herself and other anesthesia providers and patients. See (P's Amend. Compl. at ¶¶ 57, 78, 88, 97). The Plaintiff has alleged various claims under the antitrust law which under the governing standard involving a motion to dismiss under Rule 12(b)(6) must be given the presumption of correctness. That being said the Plaintiff faces a very high hurdle established by the numerous cases involving an exclusive contract between a hospital and a medical services provider. See *BCB Anesthesia Care v. Passavant Mem. Area*

Hosp., 36 F.3d 664, 667 (exhaustive list of cases dealing with antitrust claims brought by health care service providers.) However, it is this court's view that dismissal at the pleading stage may not be had. The Defendants in their various motions to dismiss rely on several facts that may not be relied upon at this stage of the proceeding. (For Example, see Reliance upon P's Dep. testimony as to her desire to do obstetrical anesthesia; GLHS Reply Memo. at p.3; Definition of relevant market; Id. at p. 4).[1]

The court is well aware of the costs involved in high stakes civil litigation and is well aware that a Defendant will seek to limit a Plaintiff's claims at each and every opportunity. However, it is this court's opinion that dismissal based upon the pleadings alone would run counter to the principles of civil jurisprudence in this matter. See *BCB Anesthesia Care v. Passavant Mem. Area Hosp.*, 36 F.3d 664, 669 (Cudahy Dissenting). Therefore the Defendants' motions to dismiss are now **DENIED**. The oral argument hearing currently set on February 22, 2002 at

[1] The court agrees that Dr. Kochert has attempted to define the relevant market as Tippecanoe County and the surrounding counties in her complaint. However, it is uncertain, at this stage of the proceeding without a factual inquiry, whether the consumers or providers go outside of the surrounding counties to receive hospital and anesthesia services. If this were true then Kochert's claims would most likely fail in light of the numerous hospital in the Indianapolis area. See Jefferson, 466 U.S. at 31. Moreover, at this stage it is uncertain whether those hospitals within the relevant market defined by Dr. Kochert provide the same type of services that are covered under the exclusive agreement between GLHS and AA. Thus, a more in depth factual determination must be had before any effects upon competition can be made.

1:30 p.m. in Lafayette, Indiana, is now reset as a pretrial conference. **IT IS SO ORDERED.**

Dated : **JANUARY 11, 2002** /s/ Allen Sharp
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

cc: all counsel

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D.,	)	
	)	
Plaintiff,	)	**Civil No.**
vs.	)	**4:01CV0027AS**
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH J. BOCHENEK, M.D.,	)	
Defendants.	)	

ORDER

The Court, having received Plaintiff's Motion for a Jury Trial and for Leave to File a Jury Demand Pursuant to Federal Rules of Civil Procedure 39(b) and 6(b) and Defendants' Objection to Plaintiff's Jury Demand, all parties having been given due notice, and the Court being duly and fully advised in the premises,

IT IS THEREFORE ORDERED:

1. Defendants' Objection to Plaintiff's Jury Demand is hereby **denied**; and

2. Plaintiff's Motion for a Jury Trial and for Leave to File a Jury Demand Pursuant to Federal Rules of Civil Procedure 39(b) and 6(b) is hereby **granted**.

Dated: 5/28/02

/s/ Allen Sharp
Judge Allen Sharp

cc: all counsel

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 6, 2006

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 05-1196

CAROLYN G. KOCHERT, M.D.,
Plaintiff-Appellant,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., doing business as LAFAYETTE HOME HOSPITAL doing business as ST. ELIZABETH MEDICAL CENTER, JOHN WALLING and ANESTHESIOLOGY ASSOCIATES PC,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 01 CV 27

Allen Sharp,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by plaintiff-appellant Carolyn Kochert on September 25, 2006, no judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the members of the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff	)	
v.	)	Civil Case
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH J. BOCHENEK, M.D. Defendants	)	No. 4:01 CV 0027 AS

EXPERT WITNESS REPORT OF
BRUCE A. SEAMAN, PH.D.

* * *

case. The first in August 1994 involved LHH (represented by John Walling) and AA (represented by Kenneth Bochenek), whereby AA agreed to schedule and provide all anesthesia services at agreed upon fees for surgery and obstetrics for LHH for a period of two years in exchange for being the exclusive provider of anesthesia services during the term of the agreement. In 1994, Plaintiff and other non-members of AA entered into a subcontract with AA to provide anesthesiology services at LHH. At the time the initial exclusive agreement was made between LHH and AA, and at the time of renewals (apparently not open to competitive bidding) in 1996 and 1998, St. E's was independently operating in Lafayette, providing both

general surgical and obstetrical services requiring (and allowing) the services of anesthesiologists in the area who were not members of AA, including the Plaintiff. The second primarily background agreement was the May 29, 1998 contract between St. Elizabeth Medical Center and Lafayette Anesthesiology (LA), whereby LA (including the Plaintiff as a member) became the exclusive provider of all anesthesia services for three years through May 31, 2001. This agreement also set forth a fee schedule for LA's services. Thus, as of mid-year 1998, there were two major independent hospitals providing surgical and obstetrical services in Lafayette, each providing anesthesia services via exclusive contracts with a different anesthesiology physician group. At the time of the filing of the *Amended Complaint,* Lafayette Anesthesiologists had eight physician members; Anesthesiology Associates had fourteen physician members. There may have been as many as twenty-five anesthesiologists serving the Lafayette area at the time the initial exclusive contracts were signed.

11. However, it is events supplemental to these initial contracts that are of special interest to the antitrust claims raised in the *First Amended Complaint.* Firstly, upon the expiration of the subcontract between Plaintiff and AA in March 1998, her contract was not renewed by AA. Furthermore, after March 1998 neither Dr. Kochert nor other doctors with Lafayette Anesthesiology have renewed or sought sub-contracts with AA allegedly due to differences on issues of training, patient care, partnership management, price of services, personal conflicts, and for other possible reasons including warnings from individual counsel that such sub-contracts could have antitrust implications (e.g. Farrell Deposition, pp.133-134) Thus, after March 1998, despite having medical privileges at

LHH, the anesthesiologist members of LA, including at that time the Plaintiff, have not been able to perform general anesthesiology services (other than non-surgically related pain management) at LHH. Similarly, anesthesiologists (including the Plaintiff and Drs. Conrad and Farrell among others) affiliated with Unity Health Care (located on Creasy Lane in Lafayette), whether members of LA or not, have not been able to exercise their clinical privileges at LHH (e.g. Eberle Deposition, 04/14/03, p. 20, lines 2-8, related also to the same issue at St. Elizabeth Medical Center at a later date; see below).

12. Secondly, the potential adverse impact of the exclusive anesthesiology contracts on surgical and obstetrical patients within the Lafayette area was heightened by the organizational change (sometimes called a merger), effective approximately January 1999, whereby Lafayette Home Hospital and St. Elizabeth Medical Center became owned and controlled by Defendant Greater Lafayette Health Services (GLHS). This was followed by the third development on or about April 7, 1999, when GLHS closed the labor and delivery unit at St. Elizabeth Medical Center and transferred all such medical services to Lafayette Home Hospital. Therefore, following April 7, 1999, Plaintiff and other LA members (and subsequently Unity Health Care affiliated anesthesiologists whether members of LA or not, including the Plaintiff) were limited to providing anesthesiology services for non-obstetrical surgeries at St. Elizabeth's Medical Center (or potentially other medical facilities in the area providing surgical services), since there no longer were any general obstetrical procedures, most notably the delivery of babies, taking place at the

* * *

and AA in the anesthesiology market, is not significantly affected by considering a local market of Tippecanoe plus the seven contiguous counties as an alternative. A very strong case can be made that the relevant geographic market for obstetrical hospital services, and for inpatient surgical services is in fact no larger than Tippecanoe County, and it is my professional opinion that the most relevant geographic market for determining the degree of market power of both the GLHS hospitals and the AA group of anesthesiologists is Tippecanoe County.

c. The four county geographic market is quite similar but not identical to the U.S. Census Bureau's definition of the Lafayette, Indiana Metropolitan Statistical Area (MSA), number 29140, which consists of Tippecanoe, Benton, and Carroll counties. It is also similar to the Census Bureau's definition of the Lafayette-Frankfort Consolidated Statistical Area, which simply adds Clinton County to the above three counties. Therefore, while the term "Greater Lafayette Metropolitan Area," cited in the *Amended Complaint* may lack precision and not be commonly used by everyone in the region, the substance of the opinion that the relevant geographic market is local and linked to the Lafayette metropolitan statistical area is in fact confirmed by a thorough economic analysis. In fact, as noted above, the most relevant geographic market for evaluating the claims in this case is even smaller than that MSA area, consisting of Tippecanoe County itself.

d. Based on these relevant product and geographic markets, the two GLHS operated hospitals do in fact have a substantial market share of hospital services in several alternative geographic markets. The 2001 combined LHH and St. E's market share is 91.54% for all admissions (omitting psychiatric admissions) in a Tippecanoe County

market, 85.62% for inpatient surgical procedures in a Tippecanoe market, and 97.7% for obstetrical admissions in a Tippecanoe market. That market share is 74.7% in a four county OB market including Tippecanoe, Montgomery, Clinton and White Counties (76.0% if expanded to an eight county market of Tippecanoe and all contiguous counties), and 61.64% for inpatient surgical procedures in the four county market (62.31% if expanded to the eight county market). Furthermore, AA has considerably greater than the 20 percent of the market for anesthesiologists identified as a "safety zone" standard by the joint Department of Justice and Federal Trade Commission health care guidelines for evaluating exclusive joint provider contracts. The actual market share is about 50%, if AA is considered to have only 15 members (not counting two *locum tenens* and one doctor under subcontract). Since those three anesthesiologists are under contract to AA, considering them a part of AA raises its market share to about 60%.

e. While market share alone is not identical to market or monopoly power (e.g. Landes and Posner,1981), the two GLHS hospitals have significant market power in the Tippecanoe market for hospital obstetrical patients, and more limited market power in the four-county local market for inpatient surgical patients. Anesthesiology Associates (AA) has market power in the provision of anesthesia services in support of obstetrical procedures in the Tippecanoe market, and also in the four county market for anesthesia services in support of inpatient surgical procedures.

f. Due to the absence of effective competition in the relevant market from other organized and experienced anesthesiology groups, and the very limited effective

hospital alternatives facing obstetrical and to a lesser extent surgical patients requiting admission exceeding twenty-three hours, hospital patients and their third party payers cannot realistically protect themselves from higher anesthesia prices, lower quality of anesthesia services or diminution of effective consumer choice without incurring excessive travel and related costs in order to seek more distant medical care alternatives. Hence, the exclusive contracts and related acts by Defendants causes antitrust injury to identifiable consumer groups worthy of protection under the antitrust laws. *Affidavits* from medical care consumers indicating that they were precluded from receiving anesthesia from the Plaintiff, and other *Affidavits* from medical personnel and family members of patients indicating serious concerns about the quality of anesthesia care being provided by AA, is one indication that the contracts and related acts at issue have already been having adverse effects on consumers in the relevant market. Furthermore, since the requirements under the exclusive contracts to both LHH and St. E's hospitals have made it effectively impossible for AA anesthesiologists to provide services at other local market hospitals, competition with GLHS hospitals from those other area hospitals has been weakened as their access to anesthesiologists has been effectively restricted in a manner similar to what economists have called "raising rivals' costs."

g. There is direct evidence in the record (from GLHS administrative officials) that GLHS would strongly prefer to contract with local anesthesia groups having physicians who have experience with their facilities, have had privileges at their hospitals, and are familiar to their surgeons. There are at least 21 alternative anesthesia groups to AA located in Indiana, but only one (LA) which is local and

meets those criteria, but whose membership has been limited by the lack of available anesthesia options in any of the alternative geographic market definitions identified above. By contrast, 20 of these groups are located from about 1.10 hours to 2.90 hours from Lafayette, and do not provide a viable competitive check on AA as the dominant provider of anesthesia services in the relevant market. The existence of individual independent or *locum tenens* anesthesiologists who travel longer distances, and the recruitment of an occasional individual anesthesiologist to become a member of either AA or LA in the local market, does not contradict the conclusion that the effective anesthesiology labor market is local. A situation in which there are only two competing anesthesia groups in a relevant market has been challenged by the Department of Justice Antitrust Division (in a business review letter related to an Orange County case) as providing inadequate competition and inducements to maintaining high quality care, a situation with strong similarities to the instant case.

h. There is no evidence in the record that the anti-competitive risks and past restrictions on effective consumer choice, and the possible reductions in the quality of care resulting from market power in either the hospital services market or the anesthesiology labor market, are counterbalanced by significant (or any) cost savings, enhanced quality of patient care, or other pro-competitive effects uniquely stemming from the exclusive contracts between GLHS and AA. In fact, the record suggests a reduction in the quality of care provided to anesthesia patients, and that the total quantity of anesthesiologists available to provide adequate quality of care in the relevant market continues to be problematic (e.g. Eberle Deposition, p. 124). Whether anesthesia prices have been

made higher as a result of the alleged unlawful acts in this case is difficult to ascertain. However, there is evidence that such higher prices exist (with testimony in the record indicating that as of February 2003, the AA rate per unit was $56, higher than any other known rate in either Tippecanoe County, or the possible four or eight county alternative market areas), and at least no evidence that anesthesia unit prices are lower in the relevant market as a result of the exclusive contracts and related acts identified in the *Amended Complaint.*

i. Finally, it is my opinion that Dr. Kochert is a relatively efficient enforcer of the antitrust laws in this particular case. Without doubt there are common situations in which an alternative supplier would not be a credible party to an allegation of anti-competitive conduct by other suppliers, since such conduct, if really anti-competitive rather than efficiency enhancing, would increase prices and/or restrict effective output to the ultimate benefit of the complaining supplier. Thus, economists would lend little credence to a complaint by Jet Blue that a merger between United Airlines and Continental Airlines would have anti-competitive effects on the Chicago to Atlanta commercial aviation route, since Jet Blue could only benefit from such effects (thus suggesting that Jet Blue's real fears may be that the merger would have pro-competitive consequences). However, economists would not so easily dismiss a Jet Blue complaint that United had conspired with Chicago O'Hare Airport to limit its access to quality gate locations, or assign it inconvenient take-off and landing slots, since such behavior could credibly deny air passengers effective access to a high quality, possibly lower priced airline. Furthermore, the Landes and Posner (1977) justification of the *Illinois Brick* ruling denying antitrust standing to indirect purchasers

was fundamentally based on the view that economic agents who are farther removed from the decision-making nexus have a more complex task of establishing a causal connection between a particular market result and its underlying cause, hence making them less efficient and higher cost enforcers of the antitrust laws. This logic can be extended to argue that an excluded potential supplier is better able to identify the potentially anticompetitive behavior and effects of particular contractual arrangements and related behaviors than are medical care consumers, especially if one views the consumers as the patients themselves. Third party-payers including managed care plans are clearly better able, and have greater financial incentives, to monitor the potentially anticompetitive effects of physician group contracts with hospitals than do the patients themselves. However, this does not imply that excluded suppliers, such as the Plaintiff in this case, cannot be efficient enforcers of the antitrust laws, and state and federal government antitrust agencies commonly serve as efficient enforcers even though they are not direct consumers.

G. OPINIONS: DETAILED DISCUSSION

Product Market Issues

31. Product market definition requires an assessment of the degree to which potential substitute goods or services are sufficiently close substitutes so as to provide effective consumer choice that protects consumers from price increases and reductions in product quality. An important concept is the cross price elasticity of demand, defined as the percentage change in the

* * *

this case the two GLHS hospitals). Again, this finding is consistent with the potential bias regarding the potentially erroneous finding of a relatively large geographic market that is recognized in the academic literature that warns against naive interpretations of relatively low LOFI (export) results stemming from an analysis of patient admissions data.

57. Furthermore, as already identified in the opinions summary (paragraph 30d), the resulting market shares of GLHS hospitals in a Tippecanoe only market are:

a. 91.54% for all hospital admissions (excluding psychiatric procedures)

b. 85.62% for inpatient surgical admissions

c. 97.7% for obstetrical (OB) admissions

These market shares can be calculated from the detailed hospital and county data provided in Exhibit H.

Table 5

Market Definition: Tippecanoe, Montgomery, Clinton and White Counties

	All Admissions		OB Admissions		Inpatient Surgical Admissions	
	LIFO	LOFI	LIFO	LOFI	LIFO	LOFI
2001	82.48	78.98	91.32	81.30	71.87	74.48
2000	82.78	78.61	91.74	80.70	74.28	73.97
1999	83.31	78.42	91.34	80.37	74.06	74.36
1998	82.91	77.42	91.06	79.33	71.37	73.18
1997	83.11	77.32	90.36	79.40	71.97	72.62

58. Since the procedure for determining relevant antitrust markets is to begin with the smallest potential market and continue to expand the market definition until a market definition can be analytically justified, a further analysis of the relevant geographic market for hospital services

* * *

Market Power and Antitrust Injury

64. The currently recognized two-pronged test for unlawful monopolization under Sherman Section 2 was established by the Supreme Court in its *Grinnell* decision (*United States v. Grinnell Corps.,* 384 U.S. 563, 570-571, 1966):

"The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Typically, in order for market conduct to be considered anticompetitive or exclusionary, it must meet two basic criteria: (1) "the conduct must be other than that encouraged by and consistent with the competitive process" such as product innovation or nonpredatory prices reductions; and (2) "the conduct must also be substantially related to the maintenance or acquisition (or attempted acquisition) of monopoly power, in that it must have (or be expected to have) the effect of destroying or excluding competition" (the quoted passages are from Fisher, McGowan and Greenwood, 1983, p. 272). Exclusionary conduct has been defined in a similar way as "conduct, other than competition on the merits or restraints reasonably 'necessary' to

competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power" (Areeda and Turner, section 626g; see also Landis and Rolfe, 1985).

65. The relevant issues are whether high market shares indicate monopoly market power, and whether such market power is the result of, and is being maintained by exclusionary behavior as opposed to being the "consequence of a superior product, business acumen, or historic accident" (*Grinnell*). As derived above, GLHS has significant market shares in the local market for inpatient hospital and obstetrical services, particularly in the Tippecanoe market. Market share is one, but not the only consideration in evaluating market power (see, e.g. Landes and Posner, 1981). Where barriers to entry are low and effective entry is possible with minimal time lags, high market share will not translate into an ability to maintain supercompetitive prices, restrict output and earn above normal economic profits. In the market for inpatient hospital surgical services and hospital obstetrical services, it is customary to presume that entry is difficult and protracted, since it is relatively uncommon for new hospitals to be established, and the governmental regulatory restrictions in the hospital industry are relatively significant. Furthermore, as noted by Simpson and Coate (1998), one way in which physician-hospital contracting can generate anticompetitive effects is by raising rivals' costs of doing business by tending to exclude physicians from practicing at competing hospitals. In this case, while AA provides a significant share of the anesthesiologists available to hospitals in the Lafayette area, the demands of the exclusive contract between AA and GLHS have, at least *de facto,* precluded any AA affiliated anesthesiologist

from providing services at any other area hospitals. Those hospitals were already shown above to be relatively weak competitors to either LHH or St. E's, so any additional competitive disadvantages that they face can only serve to further strengthen the market power of GLHS. This is one potential financial advantage to GLHS from the exclusive contracts that does not seem to have any plausible pro-competitive or efficiency enhancing effects. There is little evidence of such efficiency benefits in any case, as discussed below in paragraphs 71 and 72.

66. Furthermore, there is considerable evidence in the record in this case that adverse effects are being suffered by patients in this market in the form of a diminution of the quality of care. The extensive list of filed affidavits identified above, in which patients and in many cases medical personnel have reported AA anesthesiologists absent from operating rooms during anesthesia procedures, or asleep during such procedures, and the deposition testimony of Drs. Summer, Farrell, Eads, Moranda, and Potts, along with the testimony of Tracy Graham provide significant evidence that AA has been providing lower quality of care than might otherwise be expected in a more competitive market. The expert affidavits of anesthesiologists Drs. Ivankovich, Williams, and Minore are especially compelling regarding relevant to the issue of a reduced level of quality of care, and hence implicitly an increase in the effective price of anesthesia services in the relevant market. Hence, there is both the plausibility of antitrust injury in this case, and actual evidence of such injury in this case. The fact that another large group of people have been willing to file affidavits indicating that they have been aggrieved by a reduction in their effective choice of an anesthesiologist such as Dr.

Kochert, is further evidence of consumer harm as a result of the behavior of the defendants.

Leveraging and Essential Facilities

67. The issues of leveraging monopoly power from one market to another, the strategy of "raising rivals costs," and the degree to which a competitor is obligated to deal with a competitor in the provision of what might be called an "essential facility" have been controversial topics in antitrust law and economics. However, as is common in the evolution of economic analysis, various principles have become generally established for the evaluation of these issues.

68. Monopoly leveraging refers to the exploitation of monopoly power in one market to extend that market power into another market. The most familiar strategies are (1) tying arrangements and bundling, (2) vertical price squeezes, (3) price discrimination, and (4) service or quality discrimination (e.g., see David L. Kaserman and John W. Mayo, 1993). Economists have long debated the circumstances under which such strategies can plausibly increase profits and

* * *

Potentially undesirable results from such exclusive contracts have also been identified by industry publications (e.g. "Exclusive Contracting With Your Hospital," *The Hot Airway For the Business of Anesthesia,* Fall 1998).

71. While there is considerable discussion in the depositions of Mr. Walling and Eberle as to their potential motivation for turning to exclusive contracts to improve scheduling, ensure adequate call coverage, and encourage

optimal contracting with GLHS managed care customers, there has been surprisingly little evidence of any cost savings, or any attempt by GLHS to encourage such better performance by insisting on competitive contracting during contract renewal periods (which has not been done during any of the contract renewal periods). In fact, the following section of the Eberle Deposition of 04/14/03 (p. 177, II:5-15) is indicative of the lack of compelling evidence of real efficiencies stemming from these exclusive contracts:

Eberle: The efficiencies would be related to the publishing of the anesthesia schedule, the scheduling of cases, and in the anesthesia areas on both campuses the fact that there is one contract holder to turn to if there are any issues to deal with. One person does the schedules for both hospitals. Those are the real efficiencies.

Question: Can you measure that in cost savings – dollar amounts?

Answer: No, never attempted to.

Question: And can you measure the improved coordination in terms of dollar amounts? Answer: Not in terms of dollars, no. But in ease of running the schedule and lack of frustration and smooth operation, yes.

While this does not prove that such efficiencies do not exist, it hardly serves as an effective counterweight to the anticompetitive risks created in the relevant market in this case as a result of these contracts. Government antitrust policy has stated that the greater the competitive risks, the greater the counterbalancing efficiencies (cited above). There is no real evidence in this case to suggest that the efficiency gains are substantial enough to meet

that test, nor that other less potentially anticompetitive approaches to solving any scheduling problems could not have been found.

72. Finally, it has always been recognized in cases such as this that one normally would expect to find the hospitals with a compelling economic interest that would be consistent with improving the quality of patient care, and providing it at lower effective prices. That is, it would normally appear that hospitals' self interest correlates strongly with ultimate consumer self interest in ensuring that high quality, low priced care is provided by any physician groups contracting with the hospitals. It has already been suggested that a potential non-competitive interest of GLHS may have been to restrict the availability of anesthesiologists to competing hospitals (and by extension to surgical centers competing with GLHS in outpatient surgeries). However, it is unclear that this would provide sufficient self-interest to override the considerable evidence in the record that the quality of patient care has been compromised by the exclusive utilization of AA at GLHS facilities. Whether this is merely the result of an absence of effective administrative oversight is unclear at this time. However, the record remains that such adverse effects have been occurring in this market.

* * *

Table 4: Market Definition: Tippecanoe County*

	All Admissions		OB Admissions		Inpatient Surgical Admissions	
	LIFO	LOFI	LIFO	LOFI	LIFO	LOFI
2001	91.45	57.56	97.70	62.76	85.62	52.21
2000	91.53	56.81	97.86	61.35	86.77	50.96
1999	91.42	56.04	97.15	61.12	86.45	50.25
1998	91.33	55.85	96.93	61.43	84.47	51.04
1997	91.39	55.47	97.47	61.39	84.38	49.64

Table 5: Market Definition: Tippecanoe, Montgomery, Clinton and White Counties*

	All Admissions		OB Admissions		Inpatient Surgical Admissions	
	LIFO	LOFI	LIFO	LOFI	LIFO	LOFI
2001	82.48	78.98	91.32	81.30	71.87	74.48
2000	82.78	78.61	91.74	80.70	74.28	73.97
1999	83.31	78.42	91.34	80.37	74.06	74.36
1998	82.91	77.42	91.06	79.33	71.37	73.18
1997	83.11	77.32	90.36	79.40	71.97	72.62

Table 6: Market Definition: Tippicanoe County Plus 7 Contiguous Counties*

	All Admissions			OB Admissions			Inpatient Surgical Admissions		
	LIFO	AVG.	LOFI	LIFO	AVG.	LOFI	LIFO	AVG.	LOFI
2001	81.81	87.16	92.50	90.94	92.88	94.82	71.14	80.70	90.26
2000	81 76	87.01	92.25	90.60	92.12	93.64	72.94	81.21	89.47
1999	82.34	87.35	92.35	90.56	92.56	94.56	72.88	81.20	89.52
1998	81.80	86.69	91.57	90.36	92.34	94.31	70.39	79.80	89.20
1997	81.96	86.65	91.34	89.47	91.77	94.07	71.12	80.06	88.99

Rockford Memorial*
(D.C.)

LIFO	LOFI	AVG
93%	71-75%	82-84
85%	79%	81.9%
80%	83%	81.5%
81.4%	86.8%	84.1
77%	88%	82.5%
74.7%	90%	82.4

Market Share/Monopoly*
GLHS/Tippecanoe Country

All Admissions	91.54%
Inpatient Surgical	85.62
OB	97.7%

4 County:

Inpatient Surgical	61.64%
OB	74.7%

8 County:

Inpatient Surgical	62.3%
OB	76%

*Reproduced from Exhibit M to Supplemental Brief in Opposition to Defendants' Motions for Summary Judgment, R. 406.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE
CAUSE NO. 4:0ICV0027AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

-vs-

GREATER LaFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LaFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.,

Defendants. /

DEPOSITION OF BRUCE A. SEAMAN, Ph.D.
Tuesday, January 28, 2004
9:03 a.m. – 5:40 p.m.

1325 Virginia Avenue
Atlanta, Georgia

* * *

[22] And since it's my view that the primary competitive constraint imposed on anesthesiology groups are provided primarily by local anesthesiology groups, the weakening of that alternative constraining influence has allowed this quality of care issue to persist in a way that would not likely have persisted had there been the continuation of the exclusive contract with LA at St. E's or even perhaps

just using an open staff system and not having any exclusive contracts at all.

So I would say that in general, the anesthesiology market has been adversely affected in terms of quality of care in a way that would not have otherwise happened had GLHS not chosen to set up its contracts in a way that it has.

Q. All right. Other than eliminating the exclusive contract of LA at St. E, which occurred effective June 1, 2001, is there anything else that, in your opinion, GLHS did to exercise market power in a way that would harm competition?

A. I think, consistent with my report where I set up the background, I identified an individual exclusive contract as in and of itself not anticompetitive; it's looking at the context.

We have, of course, the sequence of events [23] starting with the March 1998 denial of the renewal of the subcontract with Dr. Kochert, followed by the closing of the OB unit.

And then, in my view, as I stated in the report, those are sort of sequential events that led then ultimately to the primary concern that I have, that given those prior events, it made that 2001 contractual arrangement much more likely to have the kind of anticompetitive effects that I mentioned a moment ago.

So it's really a matter of looking at these events as a sequence of events that, when combined, creates anticompetitive concerns that might not have been as present had those three events not been combined.

So I think you're correct that I certainly, in my report, did focus primary attention on the 2001 issue of extending the exclusive contract to AE to include also St. E's as well as LHH. The effects of that have to be viewed in the context of the prior two events.

Q. Wouldn't it be correct, Dr. Seaman, that those two prior events by themselves did not cause any antitrust injury or cause any harm to competition?

A. I think that's – I think you could view my [24] report as consistent with that view, that I looked at those as essentially individual events when viewed in isolation as not in and of themselves causing any major anticompetitive concern.

If you look at the three events together, that's what causes me concern.

Q. Would you agree, then, Dr. Seaman, that Dr. Kochert did not sustain any antitrust injury in 1998 when AA decided not to renew her subcontract with AA?

A. Well, my view of this case – I don't mean to give a rambling answer. I know that you want a yes or no answer, and I appreciate that. I just want to make this clear, though. I have always agreed, I think, with defense experts on this, Drs. Eisenstadt, Heiden, Liang, that this case cannot easily be answered or evaluated solely in terms of Dr. Kochert.

I've always viewed this case in terms of its economic consequences as broader than Dr. Kochert – she is the named plaintiff clearly – but that the case, in terms of anticompetitive consequences, does, in fact, extend to damage to competition, not just damage to a single competitor. I've always viewed it that way. And that even

though there were not other named plaintiffs, I think that the issues go beyond [25] Dr. Kochert.

So that even though in 1998 there was a particular contractual issue with her and AA that initially led her to file a suit, it also led to other contractual negotiations with other members of LA at the time, which caused other problems with subcontracting and then led to a whole sequence of events, which then further weakened LA as a competitive force.

So again, I don't mean to make this excessively fine as a distinction, but my own view of the case is that Dr. Kochert is, by antitrust standards, an efficient enforcer of the antitrust laws, but that the issues raised in this case go well beyond her individually as a particular competitor to a broader issue of the competitive issues at stake here with anesthesiology groups.

Q. Dr. Seaman, in Dr. Kochert's Memorandum in Opposition for Defendant's Rule 12 Motion to Dismiss, which was filed in this case on December 4, 2001, Dr. Kochert makes the following statement on page 38 of her brief: "Because two separate hospitals had anesthesiology services, there was not an anticompetitive effect to the market as a result of Dr. Kochert alone being barred from practicing only at

* * *

[161] Q. You have made several references both today and in your previous testimony to the cellophane fallacy?

A. Yeah.

Q. In order to really apply that concept to this case, wouldn't you have to do a dynamic test to measure the exercise in market power both pre and post June 1, 2001.

A. Remember – well, I'd say not necessarily because of the context in which I used the fallacy. Let me clarify briefly. I'll be brief.

You, obviously, had asked me a question about whether I was defining the market properly. It was in that context that I had always said –

Q. I understand.

A. My answer would be that, in that context, I was simply saying that it would be inappropriate to say that if a person could, let's say, go far and wide to evade a problem that that would automatically mean that it was a [162] regional or large scale market area, geographic area –

Q. I understand. My question is: If you're suggesting that there's been this exercise of market power, wouldn't we have to do some type of dynamic test – some time study based test to show that market power has changed both before and after the antitrust injury?

A. I think it goes back to your question about what the – you know, what's the evidence about the quality issues that are at stake in this case and is there – what's the nature of the evidence regarding the timing, the severity.

I tried to answer that to the best of my knowledge earlier, that as far as I can tell there's been a pervasive problem, that it seems to not be diminishing and I don't at the moment have a very – especially given, I think, some

of the reporting difficulties that might have occurred that I referred to earlier in terms of who's there to even report these things now without a conflict of interest arising, that I [163] don't have great evidence of – but I'm not sure that that doesn't mean that it has been increasing.

Q. You haven't attempted to do any such study, correct?

A. That's – except for sort of trying to have a general idea about what the dates are in those affidavits, no, I haven't. Right.

Q. Is there any other way that we could determine that GLHS has actually exercised market power after June 1, 2001?

A. Whether it's after 2001 or whether it's back early of the '98 period or any of those periods which are at issue here, because the whole sequence of events that really causes the issue here, I'd say it's – I mean, one way would be to sort of see whether the problem has gotten more severe in terms of the quality adjusted pricing. That would be one issue, I think.

Q. Would there be any other way?

A. Another way could be if you were to do [164] a pricing study that would sort of predict what would have happened to prices without market power versus what actually happened to market prices. That is standard. I've done those myself in price fixing cases, for example. That's one way to do it.

There could be some other kinds of issues in terms of severity of harm, in terms of surgeons complaining or something. There's been – of course, we know there have

been some surgeons who have complained in this case about those issues.

Q. Again, you haven't done that kind of study either, correct?

A. I've monitored carefully the evidence as it's been portrayed in the depositions because that serves as the factual foundation for this.

My knowledge of these issues, of course, is not as a physician but someone trying to observe what the factual record is.

Q. You talk in your report about the risk

* * *

[139] you asked right at the outset today, really, about what do we know about any real quality controlled increase in price because, again, economists measure market power not as market share, but that's one factor. I mean, you know, you can relate market power to market share, but it is not a direct translation.

And if you are asking about the standard triumvirate, quantity reduction, price increase or quality reduction, I think we know the following, that there is slightly higher nominal prices which are the contracted prices – not the contracted prices, but the so-called list prices with AA versus, say, LA. But far more importantly, there are this – I think higher prices in terms of a quality controlled situation.

When you ask that hypothetical – well, if you did that what is the pay standard I discussed earlier, what would somebody be willing to pay if they were aware of these conditions instead of what they were actually [140] paying,

I think you would find a substantial higher price. That would be the indication of market power.

Q. You would measure market power with respect to AA and GLHS in the same manner?

A. Well, I think the greatest example of market power by that standard has been in the specifics of the quality of care for anesthesiologists.

Of course, the hospital is providing this integrated service, which is the hospital services complimented with the anesthesiologists to supply either a baby delivery or a kidney transplant. And so, in that context, the hospital cannot be viewed as a totally – you know, cannot be excluded from this problem.

I mean, independent of any issue about Professor Gertler's own analysis that suggests that at least in similar type markets you can have as much as 13 to 26 percent higher prices in hospitals like that. That was the result of his study and I'm saying it is potentially [141] applicable to this market.

I'm saying that the hospital certainly when it is actually providing hospital based services, it cannot be viewed as independent of that quality problem because it is a quality problem that exists on its premises with its product.

Q. Wouldn't you be over measuring the effect of this market power if you factor in that price differential both with respect to AA's prices and the hospital's prices?

A. I would agree potentially, potentially.

Let's just put it this way, we could probably get to an easy 20% overpricing by giving each one 10% of it.

Q. Is that your opinion?

A. I take your point as well taken. And I would be cautious to just simply throw, you know, some ridiculous number.

I'm saying I think it's clear if patients were informed about this, they would [142] view that as a diminution of quality and would translate into a higher effect price and how you parse that between the two entities does not change the fact that there is, in fact, a higher quality controlled price and it's not attributed back into it.

Q. One way of evaluating that differential effect on price would be to try to calculate the number of procedures where this diminished quality of care by leaving the operating room, or whatever it is, has actually occurred?

In other words, take the total universe of procedures and try to calculate the number of times this has happened and come up with some number?

A. Again, potentially consistent. Although, I want to couch this correctly. First of all, of course, there can be underreporting of actual incidence. This is always a possibility.

I don't want to be on the record of [143] saying that my view of how often it occurs is limited solely to the number of times a particular person has come forward, because it's not a trivial thing to come forward and complain about that. I think that's something that's in evidence.

I would also say what you're really dealing with here is a variation on my theme. Let's say that it occurs in 5% of the cases. Then you would ask a potential patient, what would you be willing to pay if I told you that you have a 5% chance of being subjected to life-threatening harm because of this kind of behavior?

And I would agree with you that that is certainly going to be a – not as dramatic a lower willingness to pay or required compensation back to accept that risk than if somebody were told, you have 100% chance somebody is going to be eating a sandwich while you're unconscious.

I think that's clear, but it [144] doesn't – you know, it's really a matter of degree. I agree.

Q. So wouldn't it be fair to say then that the differential price effect, as you have termed it, is also a matter of degree to that same degree?

A. Of course, degrees matter in economics. Degrees matter when you talk about anticompetitive harm.

And one of the things that's debated by economists is whether some of the thresholds that the interested agencies use may be too generous or not generous enough or too strict or not strict enough.

You have to remember when you make that point – it's a very good point. But it's one that you have to remember, too, when I said what would somebody be willing to pay or how much would you have to accept, when I gave my answer about maybe 20% diminution, I was actually not trying to push the point.

In reality, I could have said – could [145] have easily said that if somebody were told that you were certain to be

put at this risk, somebody would probably say, I wouldn't pay a dime, I wouldn't pay a penny to go in there. So that would be a complete elimination of value. Or somebody might easily say, you couldn't possibly pay me enough to accept that risk.

If we're in that realm now, then, obviously, making the adjustment that you make is perfectly appropriate, but we're coming now from clearly elevated numbers like – and even now making that proportional adjustment, it would probably still be very big effective price increases.

Q. But you don't really have any way of quantifying it at this point; isn't that right?

A. I would ideally perhaps like to do some kind of survey of asking people or something and give them this – somewhat similar to what contingent valuation studies on environmental protection study, how much do you value this or how much would you need to be paid

* * *

AFFIDAVIT OF PROFESSOR PAUL J. GERTLER

If called to testify under oath, I would state the following to the best of my ability, recollection and expertise.

1. My name is Paul J. Gertler, and I am a Professor of Economic Analysis and Policy, at Haas School of Business, University of California, Berkeley. My credentials are reflected in my Curriculum Vitae, a copy of which is attached to this affidavit as Exhibit "A."

2. I have been retained by the law firm of Kamensky & Rubinstein in a case filed by Dr. Carolyn Kochert against Greater Lafayette Health Services, Inc. and others in the federal court in the Northern District of Indiana, Hammond Division at Lafayette, Cause No. 4:01 CV 0027AS. My hourly charge is $450.00 for this retention.

3. My opinion for this case is that there is no evidence from research which I have conducted, and in which I have participated, that exclusive relationships between doctor groups and hospitals for the provision of medical care and services produces cost-savings or an improvement in quality of medical care and treatment provided to consumers by such exclusive arrangements, except in the case of non-profit teaching hospitals in large metropolitan areas. Further, such arrangements have little effect on efficiencies, but is associated with an increase in prices, especially when the arrangement is exclusive and occurs in less competitive markets. The market for the two hospitals in Lafayette, Indiana is an example of a less competitive market and would reflect markets which have been the subject of my research and study.

4. My opinions are based upon my expertise, background, research and study, and are, as well, reflected in a research paper entitled, "Strategic Integration of Hospitals and Physicians," which is attached to this affidavit as Exhibit "B."

5. I have not testified either in depositions or at trials as an expert witness within the last four years.

FURTHER AFFIANT SAYETH NOT.

/s/ Paul J. Gertler
Paul J. Gertler, Ph.D.

Date: August 25, 2003

SUBSCRIBED and SWORN to before me
this 25th day of August, 2003.

/s/ [Illegible]
Notary Public

[SEAL] **BERTHA P. SOTO**
Commission # 1375714
Notary Public – California
Alameda County
My Comm. Expires Sep 20, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION OF LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	)	No. 4:01CV0027AS

DEPOSITION OF PAUL J. GERTLER, PH.D.

Berkeley, California

Friday, February 6, 2004

* * *

[58] vertical relationships are not a good thing?

MR. ZAREMSKI: Objection. It goes way beyond the opinions of Dr. Gertler presented in this report and in his Affidavit.

THE WITNESS: What I can say is that when hospitals and physicians engaged in closed hospital organizations and management services organizations and in open physician hospital associations, we tend to see price increases without improvements in cost and quality.

And so that leads to increased profits for those organizations and increased price premiums, insurance premiums for consumers. They seem to have no effect on the looseness form of organization. And we do see some benefits of the fully integrated organizations, and those seem to be beneficial for consumers.

Q Okay. So let me make sure I understand what you're saying. That it's the closed physician hospital organizations and the management service organizations that you believe result in price increases without improvements in quality?

A And even the open physician organizations. There's some evidence in certain markets that prices rise.

Q But the fully integrated organizations, that's not the case?

* * *

[158] from Indiana, and I found out that there were – that it was not a metropolitan statistical area and I confirmed hat there were not a large number of hospitals in the area.

Q So your opinions regarding the thesis of your research, that is that there aren't gains in efficiencies or in quality of care, would apply equally in your expertise to the Lafayette area; is that correct?

MR. PENNELL: Object to form.

MS. WOODS: Join in the objection.

BY MR. ZAREMSKI:

Q Is that correct?

A It's my view that unless it's a fully integrated organization, that I would not expect to see any gains in efficiency or any increases in quality in Lafayette, Indiana. That's based on my training, my 20 years of research, and using that to look at the thousand plus hospitals, the 300 contracts, and the patient records across many markets.

Q Okay. And in terms of when you spoke of exclusive relationships, isn't it true it also extends to providing certain medical services on an exclusive basis; isn't that correct?

A I referred to two things earlier. One was that [159] if they were admitting physicians, they could not take their patients elsewhere. And two, whether they were – if they were not admitting, they could not work elsewhere – I am sorry – it could exclude other doctors from working at the hospital.

Q Okay. For which the exclusive services are being provided?

A Right.

Q Okay. So unless the particular area was fully integrated, as you just defined it, then the area would be not fully integrated, correct?

A Correct.

Q So an exclusive contract can exist in a not fully integrated model, right?

A Correct. And we have a hundred or so cases of those in our data.

Q Okay. And based upon your expertise, do you feel that you then can extrapolate from your search into the Lafayette market?

MR. PENNELL: Object to form.

MS. WOODS: Object to form.

BY MR. ZAREMSKI:

Q I'll withdraw the question.

Now, one of the states you reviewed was the State of Wisconsin?

[160] A Correct.

Q Do the demographics within that state – strike that.

The fact that you looked at data from the State of Wisconsin, as well as Florida and Arizona and now the Commonwealth of Massachusetts, does that impact at all upon your results that you looked at Wisconsin versus Florida versus Arizona and now Massachusetts?

MS. WOODS: Object to form.

BY MR. ZAREMSKI:

Q Does that matter at all in terms of the conclusions that you've reached?

A Well, it doesn't matter to the conclusions we reached. It matters to the generalizability of the results across all types of markets and all types of firms. We wanted a midwestern state which had lots of nonmetropolitan statistical areas, where there weren't lots of hospitals so we could ask whether things in small markets

in the midwest were different than they were in a place like Florida.

And the fact that across these three states and now Massachusetts we have a heavy managed care state like Arizona, we have a midwestern state like Wisconsin, we have a northeastern state like Massachusetts, which was heavily urbanized, and now Florida, which represents [161] the south, we feel pretty confident that it represents the cross-section of the country, the types of markets you would find across the country, including Lafayette, Indiana.

Q Okay. Thank you. Now I have in my notes, Doctor, and perhaps I'm wrong in what I heard, that in your question organizational forms, and if one of them is solely for the purpose of administrative functions, would there be or would there not be an effect on pricing and quality of care?

A The theory says there shouldn't be an effect on price or on efficiency, but there were people who hypothesized there could be an efficiency effect. That's one of the reasons we wanted to test those forms, and we rejected that hypothesis.

Q Therefore the result would be that there would be what?

A That there's no evidence that contracting purely for administrative services leads to efficiency gains. And the fact that large numbers of hospitals have abandoned that particular form suggests that they themselves weren't finding any efficiency gains or gains to this contract, and therefore they dissolved them.

Q You referenced an article by Mr. Gaynor?

A Yes.

[162] Q What was the nature of that article?

A By Gaynor and Haas Wilson. That was a discussion of basically changes in hospital market structure and the antitrust implications, and he looked both at horizontal and vertical arrangements. And there's a piece of that article which summarizes the theoretical hypotheses regarding transactions, costs, and market power that we test in this paper.

Q Now, you said further on that your market power hypothesis was found to be true after your research?

A Yeah. We concluded that in a large number of these cases, and specifically with exclusive contracts, we saw that these increased market powers as evidenced by increased price cost margins.

Q So when you also used the increase of 6 percent across the markets you studied, would it be within a reasonable degree of economic certainty that it would also apply to the Lafayette area?

MR. PENNELL: Object to form.

MS. WOODS: Object to form.

THE WITNESS: Well, if I were asked to extrapolate to the Lafayette area based on what I know, which is it is a small statistical metropolitan area and it's not a fully integrated form, I would say, based on the work I've done, that we would expect to see around a – [163] anywhere from a 13 to 26 percent increase rather than just a 6 percent increase.

BY MR. ZAREMSKI:

Q And that's said within a reasonable degree of economic probability?

A Yeah, that's said with the standards of the profession.

Q Thank you.

A And one of the things I want to clarify on price increase, it would be the case that without this prices might have fallen or might have stayed stable, that is they go 6 or 10 percent more than they would have otherwise. So what exact – so by comparing the price change before and after and saying that's not 13 percent is not evidence that this is wrong.

Q Okay. Does vertical integration models confer market power in some degree?

MR. PENNELL: Object to form.

MS. WOODS: Join in the objection.

THE WITNESS: There's literature – there's quite a bit of literature in the professional economics, in the academic economics literature published in peer-reviewed literatures which provides arguments and mechanisms by which vertical integration can confer market value, and some of those are listed in our paper.

* * *

AFFIDAVIT OF
WILLIAM STEPHEN MINORE, M.D., F.C.C.P., C.P.E.

If called to testify, I would state under oath to the best of my ability, belief and knowledge the following:

1. My name is William Stephen Minore, and I am a licensed physician whose specialty is anesthesiology. I am also head of an anesthesiology group, Rockford Anesthesiologists, Ltd. in Rockford, Illinois.

2. I am a member of the American Society of Anesthesiologists ("ASA"). A standard of the Society is that qualified personnel shall be in attendance at all times during the administration of general anesthetics to patients. This is the ASA's Standard I. A Certified Registered Nurse Anesthetist ("CRNA") can also be a qualified person when a patient is undergoing general anesthetics. It is my understanding that Lafayette Home Hospital and St. Elizabeth Medical Center in Lafayette, Indiana do not have in their employ CRNAs.

3. To not adhere to Standard I is to deviate from accepted standards of care for anesthesiologists. Further, to not adhere to Standard I for an anesthesiologist is to undertake conduct which can best be described as gross negligence. Further, if an anesthesiologist were to leave the hospital while a patient was anesthetized, that anesthesiologist should be professionally disciplined, sanctioned and have the Medical Board review his licensure.

4. Patient safety and quality of care for an anesthesiologist is not measured solely by patient outcome following a procedure in which the patient is under general anesthetics.

5. Quality in terms of patient care is measured by establishing a process so that an acceptable outcome for the patient can be expected or derived. This process includes following the generally accepted standards by an anesthesiologist attending a patient who is under a general anesthetic.

6. For an anesthesiologist to not attend a patient continuously and be present in the operating room continuously while that patient is under a general anesthetic and then assert that the patient received quality anesthesia care from the anesthesiologist because the patient awoke from a surgery without complications is like saying that a pilot who lands a plane safely with passengers aboard though he was absent for part of the flight (for example, by being asleep in the pilot's seat) did not place in jeopardy the lives of those passengers while he was absent. In both situations, the conduct of both the doctor and pilot fell deeply below, and deviated from, standards governing their respective professions' standards of care.

7. For an anesthesiologist who is part of an exclusive contract for anesthesia services to leave patients unattended for periods of time while those patients are under general anesthetics perverts the very reasons for which exclusive contracts are intended and places at risk the very lives and safety of those patients.

8. From my review of certain testimony provided in the lawsuit filed by Dr. Carolyn G. Kochert against Dr. Kenneth J. Bochenek, Greater Lafayette Health Services, Inc. and others in federal court in Indiana, it is my professional opinion that Dr. Bochenek and others in his group who have left patients unattended for periods of time while under general anesthetic have deviated from a

standard of career and committed what is essentially translatable into gross negligence.

9. An anesthesiologist should not record on an anesthesiology record within a hospital chart himself/herself being present in an operating room during the administration of anesthetics on a patient when there are periods of time in which the anesthesiologist is not present. Likewise, an anesthesiologist (or his group) should not bill for periods of time an anesthesiologist is away from the operating room during the administration of anesthetics upon a patient. This constitutes fraud.

To falsely fill out an anesthesiology record in a hospital chart by an anesthesiologist or to bill for an anesthesiologist being continuously present in the operating room when the anesthesiologist is not so present is a breach of a standard of care to which an anesthesiologist should and must adhere such conduct also impacts upon quality of care that patients as consumers are entitled to receive by their anesthesiologist.

Moreover, if such conduct occurs by an anesthesiologist within a group of anesthesiologists who have an exclusive contract to provide anesthesia services, the very nature and purpose for the existence of an exclusive contract becomes perverted.

10. An anesthesiologist has the responsibility and duty to record on the anesthesiology record as part of the hospital chart periods of time in which he or she is not continuously present in the operating room during the administration of anesthetics upon a patient.

11. Federal law prohibits billing for periods of time which an anesthesiologist is not continuously present in

the operating room during the administration of anesthetics upon a patient. Specifically, this law is Part B Medicare, Subject Number AN-001, and it is attached to this affidavit.

FURTHER AFFIANT SAYETH NOT.

/s/ William Stephen Minore MD
William Stephen Minore, M.D., F.C.C.P., C.P.E.

Date: August 21, 2003

SUBSCRIBED and SWORN to before me this 21 day of August, 2003

/s/ Jeanne M. Woodman
Notary Public

"OFFICIAL SEAL"
JEANNE M. WOODMAN
Notary Public,
State of Illinois
My Commission Expires
3/11/2007

SUPPLEMENTAL AFFIDAVIT

I Stephen Minore, M.D., do hereby state the following under oath to the best of my ability, knowledge and recollection:

1. This affidavit supplements the affidavit I signed and which was filed with the federal court in the Norther District of Indiana, Hammond Division at Lafayette, on August 29, 2003, and offers rebuttal opinions to those of expert reports filed on or before December 2, 2003 by experts retained by the defendants, particularly Dr. Barbara, in the case brought by Carolyn Kochert, M.D. against GLHS, Inc., John

Walling, AAPC and Kenneth Bochenek, M.D. in federal court in the Northern District of Indiana, Hammond Division at Lafayette.

2. I received and reviewed transcript of the depositions of Kenneth Bochenek ("Bochenek") and John Walling ("Walling") taken on November 4, 2003 and November 10, 2003. Attached to the Walling transcript was Exhibit 163, an un-redacted site visit report completed in December, 1997 by the American Society of Anesthesiologists ("ASA"). The transcripts of Bochenek and Walling became available from the court reporter on or about December 6, 2003. The ASA report also became available in an un-redacted form weeks after I executed my original affidavit.

3. The ASA report, from its wording and content, was a "smoking gun" in the sense that it should have placed Walling and others within the administration of Lafayette Home Hospital at the time on notice that there were significant problems regarding rendering of anesthesia services by the exclusive group headed by Bochenek, and particularly by Bochenek's rendering of services. The report put forth that Bochenek was away from the operating rooms for extended periods of time and described Bochenek in ways that did not promote in any way an open, free and non-hostile environment by those in anesthesiology. Due to the contents of the report, there should have been physician(s) assigned to intensively monitor and report on quality of care, including patient safety and reducing risk of harm, rendered by Bochenek and others within his group. This was not done. Left unchecked, as it has been at both GLHS hospitals, quality of care, including patient safety, would diminish and be inimical to the best interest of patients who have no alternative in a real practical sense but to accept services from

the exclusive group when patients required obstetrical and in-patient (greater than a 23 hour hospital stay) surgical services.

4. Walling dismisses the concerns of Dr. Kochert (and her colleague, Dr. Meyer) as coming from a "whiner" (pp. 66-67 of his transcript of November 10, 2003) when she presented real concerns related to patient safety by those, particularly Bochenek, rendering anesthesia services. This is unfathomable and deplorable. Equally, if not more reprehensible, is the complete denial by Bochenek, and also by Walling, that there were any compromises in patient safety or an increase in risk of harm, arising from anesthesia services provided by members of the exclusive group, notably by Bochenek. This smacks of a conspiracy of silence and a grade one cover up – all to the detriment of maximizing patient safety and providing quality of care. Walling has stated that the exclusive group has increased quality of care, but, in reality, the opposite has occurred.

5. I have reviewed the affidavit/report executed by Karen Williams, M.D. I agree with the contents of what she executed.

6. This Supplemental Affidavit is intended to rebut the report of Dr. Barbara in considerable ways, principally because he is not an anesthesiologist, he expresses only personal observations, his opinions are based on limited information and testimony, and he is not the most appropriate person to render views on ensuring quality of care, inclusive of patient safety and reducing risk of harm, to patients by anesthesiologist in the exclusive group at GLHS, Inc.

7. My assessment and opinions are consistent with paragraph 13 of Dr. Liang's report where he states: "Any analysis of the quality effects of the exclusive service arrangements must be based upon relevant data at the locale of the provision of healthcare."

FURTHER AFFIANT SAYETH NOT.

Date: December 9, 2003

/s/ William Stephen Minore MD
W. Stephen Minore, M.D.

SUBSCRIBED and SWORN to before
me this 9th day of December, 2003

/s/ Jeanne M. Woodman
Notary Public

"OFFICIAL SEAL"
JEANNE M. WOODMAN
Notary Public,
State of Illinois
My Commission Expires
3/11/2007

AFFIDAVIT OF KAREN S. WILLIAMS

If called to testify under oath, and to the best of my knowledge, recollection and belief, I would state the following:

1. My name is Karen S. Williams. I am a medical doctor whose specialty is anesthesiology. I have been in practice for 14 years. I am currently the Medical Director of Perioperative Services at St. Agnes Health care, 260-bed facility with 14 operating rooms, in Baltimore, Maryland. I am also Regional Vice President of North American Partners in Anesthesia of Maryland.

2. I am also currently the Chair of the American Society of Anesthesiologist's ("ASA") Committee on Surgical Anesthesia. The following duties of the committee are stated in Section 5.5152: Promote study and investigation in the field of surgical anesthesia, determine methods to provide good clinical anesthesia for all patients, and act as liaison representative to the various surgical organizations, including the American College of Surgeons. *The ASA is the largest professional association in the United States for anesthesiologists.*

3. Attached hereto as Exhibit A is the Policy Statement on Practice Parameters adopted by the ASA House of Delegates in 1993 and last revised in 1999. That Statement provides, in part, that practice standards are rules or minimum requirements for clinical practice.

4. Attached hereto as Exhibit B as the Practice standards for Basic Anesthesia Monitoring adopted by the ASA House of Delegates in 1986 and last revised in 1998. Standard I state that qualified anesthesia personnel shall be present in the room throughout the conduct of all general anesthetics, regional anesthetics and monitored anesthesia care.

5. My comment as a practicing clinician, and not on behalf of the ASA House of Delegates, is that Standard I was developed to enhance patient safety.

6. Due to rapid changes in patient status during anesthesia, qualified anesthesia personnel shall be continuously present to monitor the patient and provide anesthesia care. Continuously is defined as "prolonged without any interruption at any time." In the event that an emergency requires the temporary absence of the person primarily responsible for the anesthetic, the best

judgment of the anesthesiologist will be exercised in comparing the emergency with the anesthetized patient's condition and in the selection of the person left responsible for the anesthetic during the temporary absence.

Further affiant sayeth not.

/s/ Karen S. Williams
Karen S. Williams

Dated: [August] ~~July~~ 12, 2003

SUBSCRIBED and SWORN
to before me this 12th day of
August, 2003
/s/ Carolyn A. Ingal
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a/ LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	) CIVIL NO. 4:01CV27AS) DEPOSITION OF DR. WILLIAM STEPHEN MINORE) 12-19-03

Deposition of DR. WILLIAM STEPHEN MINORE, a witness of lawful age, taken on behalf of the defendants, Anesthesiology Associates, P.C., John Walling and Kenneth Bochenek, M.D., in the above-entitled cause, wherein Carolyn Kochert is the plaintiff and Greater Lafayette Health Services, Inc., et al. are the defendants, pending in the District Court of the United States for the Northern district of Indiana, Northern Division, Hammond Division at Lafayette, before Deb Fisher, Notary Public in and for Winnebago County, Illinois, in the offices of Rockford Anesthesiologists Associated, 2202 Harlem Road in the City of Loves Park, State of Illinois, on the 19th day of December, 2003, commencing at 4:30 p.m., as reported and transcribed by Deb Fisher, Certified Shorthand Reporter in and for the state of Illinois.

* * *

[38] before there was really a board certification for pain management. And I also teach at the review course.

Q. Do you practice in any facilities other than the two hospitals that you mentioned, SwedishAmerican and Saint Anthony's?

A. The Rockford Ambulatory Surgical Center, and Northwest Suburban Community Hospital, which is a bariatric center. And occasionally I'll go out to Freeport Memorial Hospital and do a case or two out there just to see what's going on. That's one of the hospitals that my group covers.

Q. Does your group have any exclusive services arrangement at any of these facilities?

A. We have an exclusive arrangement at SwedishAmerican. At Saint Anthony's we have an exclusive, save for two independents who are not affiliated. Freeport we have an exclusive anesthesia arrangement, and the surgery center we have an exclusive arrangement.

Q. From your point of view as a practitioner, do you recognize the benefits to having these exclusive arrangements for you or your practice group?

A. Well, with an exclusive arrangement it gives you [39] a lot more responsibility and accountability, which is good, because the whole idea of an exclusive arrangement is for public policy issues that you improve the quality of care, because the hospital administrator, when there's something wrong, doesn't have to have four individuals all pointing divergent fingers at one another.

From the issue of discipline, there are certain unique problems that an exclusive arrangement does engender,

but if handled appropriately, those could be overcome; i.e., QA issues. But like anything, they can be abused.

I feel in this case that they were abused, but I also feel that exclusive arrangements were public policy issues in radiology, anesthesiology, pathology, and ER because the hospital has a fiduciary responsibility to the community to provide comprehensive, continual and quality care. And with the anesthesia in the past, prior to the utilization of exclusive arrangement, you would have heterogenous individuals and there would be no way to get them to do anything that the hospital wanted; i.e., provide continuous coverage.

* * *

STATE OF INDIANA	)	IN THE TIPPECANOE
	)	SUPERIOR COURT
	)	SS:
COUNTY OF TIPPECANOE	)	CAUSE NO.
	)	79D02-0003-CP-00045

CAROLYN G. KOCHERT, M.D.,	)
Plaintiff,	)
	)
v.	)
	)
KENNETH J. BOCHENEK, M.D.,	)
	)
Defendant.	)

DEPOSITION OF CORNELIUS A. HOFMAN

February 4, 2004

Boise, Idaho

(1) Present Value of Economic Loss: March 1998 through February 1999 (see Table 5u)

From	Through	Years	Average Hours Worked per Week	Average Hours Worked per Week in 1997	Ratio to 1997 Weekly Hours	1997 Earnings	Inflation Factor to Convert 1997 Earnings to 2003 $	1997 Earnings in 2003 $	Projected Period Earnings in 2003 $	Actual Annual Earnings	Actual Period Earnings	Inflation Factor to Convert Actual Period Earnings to 2003 $	Actual Period Earnings in 2003 $	Present Value of Estimated Loss
Mar-98	Dec-98	0.83	88.0	50.0	1.76	$446,386	1.1411	$509,360	$744,073	$468,380	$388,755	1.1236	$436,795	$307,278
Jan-99	Feb-99	0.17	73.3	50.0	1.47	446,386	1.1411	509,360	127,289	578,631	98,367	1.0993	108,135	19,154
													Total	$326,432

(2) Present Value of Economic Loss: March 1999 through July 2000 (see Table 5u)

From	Through	Years	Average Hours Worked per Week	Average Hours Worked per Week in 1997	Ratio to 1997 Weekly Hours	1997 Earnings	Inflation Factor to Convert 1997 Earnings to 2003 $	1997 Earnings in 2003 $	Projected Period Earnings in 2003 $	Actual Annual Earnings	Actual Period Earnings	Inflation Factor to Convert Actual Period Earnings to 2003 $	Actual Period Earnings in 2003 $	Present Value of Estimated Loss
Mar-99	Dec-99	0.83	73.3	50.0	1.47	446,386	1.1411	509,360	621,470	578,631	480,264	1.0993	527,952	93,519
Jan-00	Jul-00	0.58	64.0	50.0	1.28	446,386	1.1411	509,360	378,149	402,766	233,604	1.0635	248,449	129,700
													Total	$223,219

(3) Present Value of Economic Loss: August 2000 through working life (see Table 10u and 11u)

Year	To Age	Percent of Year	Expense Base	Age-Education Life Cycle Factor	Life-Cycle Adjusted Money Earnings	Worklife Adjustment Factor	Present Value of Loss (Lower Bound)	Present Value of Loss (Upper Bound)	Cumulative Loss (Lower Bound)	Cumulative Loss (Upper Bound)
2000	46.37	42%	$99,600	1.00000	$99,600	0.95694	$40,031	$40,031	$40,031	$40,031
2001	47.37	100%	99,600	1.00000	99,600	0.95694	95,311	95,311	135,342	135,342
2002	48.37	100%	99,600	1.00000	99,600	0.95694	92,535	94,367	227,877	229,709
2003	49.37	100%	99,600	1.00000	99,600	0.95694	89,840	93,433	317,717	323,142
2004	50.37	100%	99,600	1.00000	99,600	0.95694	87,223	92,508	404,940	415,650
2005	51.37	100%	99,600	1.00000	99,600	0.95694	84,682	91,592	489,622	507,242
2006	52.37	100%	99,600	1.00000	99,600	0.95694	82,216	90,685	571,838	597,927
2007	53.37	100%	99,600	1.00000	99,600	0.95694	79,821	89,787	651,659	687,714
2008	54.37	100%	99,600	1.00000	99,600	0.95694	77,496	88,898	729,155	776,612
2009	55.37	100%	99,600	1.00000	99,600	0.95694	75,239	88,018	804,394	864,630
2010	56.37	100%	99,600	1.00000	99,600	0.95694	73,048	87,147	877,442	951,777
2011	57.37	100%	99,600	1.00000	99,600	0.95694	70,920	86,284	948,362	1,038,061
2012	58.37	100%	99,600	1.00000	99,600	0.95694	68,855	85,430	1,017,217	1,123,491
2013	59.37	100%	99,600	1.00000	99,600	0.95694	66,849	84,584	1,084,066	1,208,075
2014	60.37	100%	99,600	1.00000	99,600	0.95694	64,902	83,746	1,148,968	1,291,821
2015	61.37	100%	99,600	1.00000	99,600	0.95694	63,012	82,917	1,211,980	1,374,738
2016	62.37	100%	99,600	1.00000	99,600	0.95694	61,176	82,096	1,273,156	1,456,834
2017	63.37	100%	99,600	1.00000	99,600	0.95694	59,395	81,283	1,332,551	1,538,117
2018	63.50	13%	99,600	1.00000	99,600	0.95694	7,692	10,553	1,340,243	1,548,670
							$1,340,243	$1,548,670		

EX. NO. 271
DATE
ASSOCIATED REPORTING, INC.

AFFIDAVIT OF ANTHONY D. IVANKOVICH, M.D.

If called to testify under oath, I would state to the best of my ability, knowledge and belief the following.

1. My name is Anthony D. Ivankovich. I am a medical doctor who has been practicing medicine with a specialty in anesthesiology since 1970. I am head of University Anesthesiologists, a group of approximately 50 anesthesiologists in private practice. I am also Associate Vice President and Director, Surgical Services at Rush-Presbyterian-St Luke's Medical Center and Rush University, Chicago, Illinois. A copy of my abbreviated curriculum vitae is attached to this affidavit.

2. I am a member of the American Society of Anesthesiologists ("ASA"), the largest professional association in the United States for anesthesiologists.

3. Standard I of the ASA states, "Qualified anesthesia personnel shall be present in the room throughout the conduct of all general anesthetics, regional anesthetics and monitored anesthesia care." Qualified personnel include anesthesiologists or Certified Registered Nurse Anesthetists ("CRNA").

4. Members of the ASA should abide by the standards of the ASA.

5. Based upon my years of experience, Standard I means just what it says, and that qualified anesthesia personnel should be present continuously in the operating room while the patient is being administered general anesthetics. This opinion applies to any anesthesiologist in

whatever health care facility he or she practices – whether in urban areas or in semi-rural or rural area.

6. For an anesthesiologist to leave a patient unattended for period(s) of time without the presence of qualified and experienced anesthesia personnel jeopardizes the health and safety of a patient and diminishes the quality of care provided that patient, regardless of the outcome to the patient. For an anesthesiologist to leave a patient so unattended even if the patient's health and welfare are not affected at the conclusion of the case would be, by way of analogy, like an airplane pilot falling asleep during an airplane flight, only to wake up before landing, assuming the controls and having the passengers safely arrive at their destination.

7. If a hospital does not have CRNAs on its staff, the only qualified anesthesia personnel in the operating room would be the anesthesiologist.

8. An anesthesiologist should not record on an anesthesiology record within a hospital chart himself/herself being present in an operating room during the administration of anesthetics on a patient when there are periods of time in which the anesthesiologist is not present. Likewise, an anesthesiologist (or his group) should not bill for periods of time an anesthesiologist is away from the operating room during the administration of anesthetics upon a patient. To see either of these is a foundation for disciplining the physician or group. To bill

for anesthesia services not rendered is tantamount to fraudulent conduct on the part of the billing entity.

FURTHER AFFIANT SAYETH NOT.

/s/ Anthony D. Ivankovich, M.D.
Anthony D. Ivankovich, M.D.

Dated: August 11, 2003

SUBSCRIBED and SWORN to before me this 11th day of August, 2003

John F. Ranos
Notary Public

OFFICIAL SEAL
JOHN F. RANOS
NOTARY PUBLIC,
STATE OF ILLINOIS
MY COMMISSION
EXPIRES 5-29-2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff,	)	
vs.	)	CIVIL NO. 4:01CV27AS
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D., Defendants.	)	

CONTINUED DEPOSITION OF DOUG EBERLE

The continued deposition upon oral examination of DOUG EBERLE, a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the plaintiff, at the Law Offices of Stuart & Branigin, 300 Main Street, Lafayette, Indiana, on the 14th day of April, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[55] Q So economics did not play into it?

A Economics played into it in that prior to signing an exclusive agreement anesthesiologists charged whatever they wanted for the provision of anesthesia services. Once we signed an exclusive – or once we signed an exclusive contract in [56]

anesthesia the hospital then was able to effect what charges of the group the patients received.

Q Am I correct in understanding then that an exclusive contract, including the one you signed with Dr. Farrell back in – capped charges for anesthesiology services?

A I wouldn't say they capped charges. The contract had an agreed upon rate that would be charged.

Q And I believe it's per unit?

A Yes.

Q I think that's how it would be worded. Now is that having a contract with a specific charge, does that benefit the hospital back in '98 – St. Elizabeth – would that be beneficial for the hospital?

A Definitely.

Q Why?

A Because we would be able to tell patients what an estimated – the estimated cost was going to be for a particular procedure. Prior to that anesthesiologists charged whatever they wanted.

* * *

[59] Q Okay. In what way would the anesthesiology group participate with third party payors?

A They would have an agreement as to what they – it would charge a patient for whom a third party was paying the bill.

Q And would that be a favorable development from the third payor's perspective?

A Well, I can't speak for the third party payors, but I would think so.

Q Okay. And would it be a favorable development from the hospital's perspective?

* * *

A It favors the hospital because that means a third party payor would not be over charged at the hospital for something that the hospital [60] **did not control prior to contract.**

Q Now you use the word over charge. How would you know that – and again, we're talking about the '98 timeframe – how would you know that the third party payor would be over charged?

A In negotiations with third party payors they would ask to have an agreement with the hospital-based physicians.

Q Was it that the third party payors were to ask for an agreement, is that right?

A Yes.

Q Between – now this agreement would be between whom?

A Between the third party payor and the physicians providing services in the hospital.

Q Now having such an agreement, would that benefit the hospital as well?

A Yes.

Q In what way would that benefit the hospital?

A The third party payors would not discourage their covered lives from coming to St. Elizabeth.

* * *

The lower courts failed to explain why the propositions set forth in the left hand column were insufficient to overcome the courts' empirical conclusions, which are set forth in the right hand column.

Response	District Court
Eberle testified that GLHS did have an economic interest in the exclusive contracts for anesthesia services. App. 128-131.	Petitioner's tying claims were deficient because GLHS had no economic interest in the anesthesia services provided by AA. App. 25.
Exclusive contracts can become illegal if used to foreclose competitors in markets controlled by those having market control. Seaman has already defined with admitted testimony the product and geographic markets, Respondents' market control, and undertook a satisfactory dynamic analysis of the markets. *See* references to Seaman in Petition.	The group boycott claims are illegal only if used to enforce agreements that are illegal. App. 26.
Petitioner has shown harm to competition through decreased quality (Minore, Ivankovich); pricing (Seaman, Gertler) (*see* references in Petition); and output (deposition testimony, GLHS consultant's report, and Minore's testimony.)	Petitioner failed to show actual harm to competition. App. 27.
Gertler testified that pricing increased 13-26%; the norm is about 6% for such contracts. App. 108-109. Seaman testified to an increase of	There was no evidence to suggest that prices have increased beyond those in Lafayette and other parts of Indiana. *Id.*

20% based on quality of care issues. App. 98.	
Minore testified to the exclusive group abusing the exclusive arrangements (App. 121), and there was no evidence of this abuse before the contracts were first executed; also, market power was first established in 1997, per Seaman's analysis (App. 89), without evidence that it existed to the contrary before this time.	Petitioner failed to show that quality of care was reduced after the exercise of market power. App. 27.
Seaman did a dynamic analysis found acceptable by the district court and which showed patients did not have a choice. App. 45-46. Any differences could be tested by cross examination. *Id.*	There was no harm to competition because patients could choose to go elsewhere. App. 28.
Seaman established the relevant product market (App. 38-41), the relevant geographic market (App. 41-45), and market power (App. 82-86, 89). Also, it is this Court's law that once testimony is admitted, it is not just reliable, but relevant as well. Relevancy = materiality. What was at issue in *Daubert* was not, as the district court stated, reliability and methodology, because methodology	Petitioner failed to adequately define the relevant markets (App. 28, n.3), failed to show GLHS had market power to restrain trade (App. 27), and that the methodology employed by Seaman and its reliability were only at issue when the court decided its *Daubert* ruling. (App. 30, n.4)

is *only part of* reliability; the other prong is relevancy.

Seaman's LOFI-LIFO analysis was found relevant and reliable by the district court. App. 41-45, relying upon the 7th Circuit's decision in *Rockford Memorial* as prevailing law. The district court relied on cases that were bench proceedings without any *Daubert* analysis. App. 29-30. These were the very same cases that the district court distinguished in its *Daubert* order. App. 42. ("The court also finds it significant that the cases cited by the defendants to support this argument did not involve *Daubert* challenges.") *Id.*

Petitioner's geographic market was too narrow, referencing inadequacy of LIFO-LOFI. App. 29-30.

The district court found Seaman did not ignore commercial realities because of the dynamic analysis he did of the geographic markets found relevant and reliable. App. 45-46. Seaman recognized that there could be other hospitals patients might go to, but that they were not viable alternatives. App. 46.

Petitioner ignored the commercial realities of Lafayette. App. 30.

This case is not about the merger of the hospitals, but

Respondents' actions were pro competitive, referring to

the anticompetitive effect of exclusive contracts (on the marketplace and competitors) whose signatories controlled the market. Gertler testified that these contracts did not produce efficiencies. App. 101 (¶3) (exclusive contracts produce no cost savings), 105 ("I would not expect to see any gains in efficiency or any increases in quality in Lafayette, Indiana.").	GLHS' closure of the OB unit at SEMC. App. 31.
Testimony provided by Walling and Bochenek established that the master exclusive dealing contract between GLHS and AA was not in existence in 1998, yet Petitioner was told by Bochenek in 1998 that it was – requiring her to still have a subcontract. Proofs in the record show this.	There was no conspiracy to monopolize. App. 31-32.
There was no state court order that dismissed the claims Petitioner asserted regarding the non existence of the master contract. Proofs in the record show this.	*Res judicata* applied (App. 33).
Hofman calculated damages to Petitioner from 1998-2018. App. 124. Hofman used 1998 as the starting point for this calculation. Damages continued because Petitioner was never allowed	Damages arose solely from the denial of the exclusive contract. App. 23.

to reenter the anesthesiology services market, through 2002-2003 (App. 4). From previous references as well, Seaman established that anti-trust activity commenced in 1998 too, and went forward into 2001 and beyond. App. 91.

There is no prevailing law that states harm to a competitor must be the same harm caused to the competition. A competitor's harm can be economic loss to one's business (*Angelico*), and harm to competition is measured by a decrease in quality, an increase in pricing or a decrease in output (*see* citations in the Petition, *supra*). Both injuries arose out of the same anti-competitive behavior – the operation of the exclusive dealing contracts in relevant markets by signatories which had market control – already established by Seaman's testimony.

Petitioner did not show harm to competition, but only harm to herself; but her harm did not result from increased prices for anesthesia services or diminished anesthesia services as she asserted occurred to the competition. App. 24.

Response

Seaman testified that the sequence of events commenced in 1998. App. 91. This was the first instance where Respondents exercised their market control to exclude a competitor.

Appellate Court

Petitioner could not present any evidence that any of the events of 1998 were part of an anti competitive scheme. App. 13.

Hofman established continuing economic loss into 2018. App.124. Petitioner also was ready, willing and able to reenter the anesthesiology market as late as 2003. App. 4. Even if 2001 were a starting point, Petitioner was still a competitor in markets defined by admitted expert testimony with Respondents exercising market power (App. 89), and who sustained continuing economic loss into 2018 (App. 124).	Petitioner suffered no antitrust injury in 2001, because she was out of the market by then. App. 14-15.
Seaman testified antitrust activity started in 1998 and went forward; not starting in 2001 and looking backward. App. 89, 91, 95.	Petitioner attempted to post date her participation in the market as proof of antitrust injury. App. 14.
The court totally disregarded Petitioner's main expert on pricing, Gertler. Prices were considerably affected by the exclusive contracts, rising 13-26% above the norm of 6%. App.108-109. Overpricing due to the contracts was an easy 20% due to diminution in the quality of care provided to patients by the exclusive group. App. 98 (Seaman).	Petitioner ("and 'her expert'") had no evidence that prices were affected by anticompetitive activity. App. 17.
The court completely ignored Gertler's testimony on pricing, as noted, *supra*.	Petitioner relied exclusively upon quality of care as proof of anticompetitive effect and

as proof of "quality adjusted" costs. App. 17.

Such evidence was tantamount to gross negligence, per Minore. App. 111-112 (leaving patients unattended for periods of time deviates from a standard of care and is essentially translatable into gross negligence). Qualified as reliable by the district court, he didn't require a statistical analysis to form his opinions based on the record. The exclusive group abused its contracts by the quality of care it rendered to patients. App.121 In discussing the "anecdotal" evidence Minore relied upon of which the (appellate) court was critical, though not constituting manifest error, the district court stated that Minore relied upon sufficient [anecdotal] testimony from other witnesses, so that his testimony should not have been excluded. App. 57. The district court opined if there was any "shoddiness" from reviewing limited testimony of others that he relied upon, it could be tested through cross examination and the presentation of

Petitioner's use of anecdotal evidence and physician affidavits to substantiate diminished care rather than statistical analyses is not useful. App. 17.

contrary evidence. *Id.* Proofs also exist in the record showing that the reason the exclusive contracts were entered into had only to do with anesthesiologists covering GLHS hospitals in 1994, and not deficient quality of anesthesia care.	
Evidence was provided by the admitted expert testimony of five highly qualified experts, dozens of affidavits, and many depositions (all on quality, pricing, and output) ignored or weighed by the court.	The record is bereft of credible evidence of the type of anticompetitive effects alleged by Petitioner.

FILED
JAN 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-822

In The
Supreme Court of the United States

CAROLYN G. KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a LAFAYETTE HOME HOSPITAL and d/b/a ST. ELIZABETH'S MEDICAL CENTER, JOHN WALLING and ANESTHESIOLOGY ASSOCIATES, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF THE RESPONDENT ANESTHESIOLOGY ASSOCIATES, P.C.

JUDY L. WOODS
Counsel of Record
BOSE MCKINNEY & EVANS LLP
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
Telephone: 317-684-5000
Facsimile: 317-223-0181

Attorneys for the Respondent, Anesthesiology Associates, P.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the Petitioner has presented any compelling reason to grant the Petition based on her confusion of the standard for admitting expert testimony, as set forth in FED. R. EVID. 702 and by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), with the standard for entry of summary judgment under FED. R. CIV. P. 56(c).

II. Whether Petitioner has presented any compelling reason to grant the Petition, where the Seventh Circuit's Opinion affirming the district court's Decision and entry of summary judgment against the Petitioner, on the grounds that she lacks antitrust standing because she has not suffered an antitrust injury and is not an efficient enforcer of the antitrust laws, is based on well-settled federal law.

CORPORATE DISCLOSURE STATEMENT AS REQUIRED BY SUPREME COURT RULE 29.6

There are no parties to the proceedings other than those listed in the caption.

Respondent, Anesthesiology Associates, P.C., is a medical professional corporation organized under the laws of, and domiciled in, Indiana. Anesthesiology Associates, P.C. has no parent corporation. All of the stock of Anesthesiology Associates, P.C. is privately held by individuals, and no public entity holds 10% or more of its stock.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT AS REQUIRED BY SUPREME COURT RULE 29.6..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

SUMMARY OF REASONS TO DENY THE PETITION 1

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO THE PETITION 6

A. The Trial Court's Admission Of A Party's Expert Testimony Under *Daubert* Does Not Preclude The Court's Subsequent Entry Of Summary Judgment Against That Party 7

1. Admissible, Expert Testimony Is Not Necessarily Sufficient Evidence To Preclude Entry Of Summary Judgment As A Matter Of Law 7

2. Kochert's Expert Witness Testimony Was Not Sufficient To Forestall Summary Judgment. 9

3. The Lower Courts Provided Detailed And Clear Explanations Of Their Rulings, And There Is No Need For Further Instruction From This Court 13

B. Kochert Lacks Antitrust Standing 14

1. Kochert Did Not Suffer An Antitrust Injury 14

TABLE OF CONTENTS – Continued

Page

2. Kochert Did Not Demonstrate Injury To Competition 17

3. Kochert Is Not An Efficient Enforcer Of The Antitrust Laws 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Air Courier Conf. of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517 (1991)..... 13

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....11

Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).....14, 17, 19

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).....15, 19

Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002).....10, 11

Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994)..... 20

Ball Mem'l Hosp. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986)..... 18

Barnes v. Kerr Corp., 418 F.3d 583 (6th Cir. 2005) 10

BCB Anesthesia Care v. Passavant Mem'l Area Hosp., 36 F.3d 664 (7th Cir. 1994)..... 18

Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995), *cert. den.*, 516 U.S. 1184 (1996)..... 18

Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477 (1977).....14, 15, 17

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir.), *cert. den.*, 488 U.S. 852 (1988).....11, 12

TABLE OF AUTHORITIES – Continued

Page

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Davies v. Genesis Med. Ctr., 994 F. Supp. 1078 (S.D. Iowa 1998) 18, 19

Frye v. United States, 293 F. 1013 (1923) 8

FTC v. Indiana Fed. of Dentists, 476 U.S. 447 (1986) 12

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 8, 11, 13

Greater Rockford Energy & Technology Co. v. Shell Oil Co., 998 F.2d 391 (7th Cir. 1993), *cert. den.*, 510 U.S. 1111 (1994) 15, 17

Hager v. Venice Hosp., Inc., 944 F. Supp. 1530 (M.D. Fla. 1996), *aff'd*, 132 F.3d 1461 (11th Cir. 1997) 18

HTI Health Servs., Inc. v. Quorum Health Group, Inc., 960 F. Supp. 1104 (S.D. Miss. 1997) 18

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 19

In re Eastern & So. Dist. Asbestos Litig., 52 F.3d 1124 (2d Cir. 1995) 8, 9, 11

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 12, 17, 18

Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002), *reh'g and reh'g en banc den.* (2003) 14

Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361 (7th Cir. 1983) 12

Morgan v. United Parcel Service of Am., Inc., 380 F.3d 459 (8th Cir.), *cert. den.*, 544 U.S. 999 (2004) 10

TABLE OF AUTHORITIES – Continued

Page

Oksanen v. Page Mem'l Hosp., 945 F.2d 696 (4th Cir. 1991), *cert. den.*, 502 U.S. 1074 (1992) 18

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088 (9th Cir.), *cert. den.*, 525 U.S. 1017 (1998) 10, 11

Sanner v. Board of Trade of the City of Chicago, 62 F.3d 918 (7th Cir. 1995) 17, 19

Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs., 917 F. Supp. 1282 (N.D. Ill. 1996) 18

CONSTITUTION, STATUTES AND RULES

United States Constitution Article III 14

15 U.S.C. § 1 ..... 2, 3, 6, 14, 18

15 U.S.C. § 2 ..... 2, 3, 6, 14, 18

15 U.S.C. § 4 14

42 U.S.C. § 2000e 16

FED. R. CIV. P. 50(a) 8

FED. R. CIV. P. 56 ..... *passim*

FED. R. EVID. 702 ..... 1, 6, 8, 9

SUP. CT. R. 10 1

SUMMARY OF REASONS TO DENY THE PETITION

The Petitioner, Carolyn G. Kochert, M.D. ("Petitioner" or "Kochert") has presented no compelling reason for granting her Petition for a Writ of *Certiorari* ("Petition"). *See* SUP. CT. R. 10. Petitioner has failed to demonstrate that the October 6, 2006, Opinion of the Court of Appeals for the Seventh Circuit ("Opinion"), which affirmed the December 29, 2004, Decision of the District Court for the Northern District of Indiana, granting summary judgment for the Respondents on all of Petitioner's claims ("Decision") is in conflict with any decision of this Court or another Court of Appeals. Petitioner has not presented any important question of federal law that has not been settled by this Court. Petitioner's claim that the Opinion and Decision of the lower courts improperly melded the standards for admissibility of expert witness testimony under FED. R. EVID. 702 and this Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), with the standard for granting summary judgment under FED. R. CIV. P. 56 is based on her misapplication of those standards. A determination that an expert's report or testimony is relevant and reliable under *Daubert* does not automatically preclude entry of summary judgment. A district court's admission of expert testimony does not equate to a finding that there are genuinely disputed material facts sufficient to preclude entry of summary judgment.

The lower courts correctly found that the Petitioner lacks antitrust standing because she failed to demonstrate the existence of an antitrust injury proximately caused by the antitrust violations she alleged and that she would be

an efficient enforcer of the antitrust laws. The lower courts reached the correct result on the basis of Kochert's lack of antitrust standing, and on other grounds omitted by the Petitioner in her presentation to this Court.

Petitioner's suggestion that this Court should provide instruction to lower courts to provide greater detail in their rulings is not a proper ground on which to grant the Petition. This Court should deny the Petition because this case does not qualify for, nor otherwise merit, review by this Court.

STATEMENT OF THE CASE

The dispute in this case is whether Kochert, a pain management specialist who no longer practices anesthesia, has standing to bring, and has suffered, an antitrust injury proximately caused by the Respondent, Anesthesiology Associates, P.C.'s ("Anesthesiology Associates") 1998 decision not to renew her subcontract to provide anesthesia services at Lafayette Home Hospital ("Home Hospital"); the 1999 decision of the Respondent, Greater Lafayette Health Services, Inc. ("GLHS"), to close its obstetrics unit at Saint Elizabeth's Medical Center ("St. Elizabeth Medical Center"); and GLHS's 2001 decision to use a single contract provider for anesthesia services at its Home Hospital and St. Elizabeth Medical Center campuses, by awarding the exclusive anesthesia services contract to Anesthesiology Associates, and not to Lafayette Anesthesiologists, Inc. ("Lafayette Anesthesiologists"), a competing group of anesthesiologists with which Kochert had severed her ties in 2000. The Petitioner asserted claims under Sections 1 and 2 of the Sherman Act (15

U.S.C. §§ 1, 2) and comparable provisions of Indiana law, alleging unreasonable exercise of monopoly power, conspiracy to monopolize, tying, group boycott, an alternative group boycott theory and an essential facilities theory. The lower courts correctly held that she did not demonstrate any injuries to competition, and that her Sherman Act claims were otherwise deficient as a matter of law.

Petitioner's Factual Background section of her Statement of the Case misstates the facts in several important respects. First, Kochert states that "Throughout the entire time period of this case," she "remains in Lafayette as a competitor in anesthesiology." Petition, p.6. Kochert contradicts her own statement on the next page of her Petition, when she states she sought work in a field outside anesthesiology in March 1988 (*id.* at 7), and that she trained for and established a pain management practice, in which she worked on a full-time basis by the fall of 2000. *Id.* at 8. The district court found that Kochert "was no longer in the business of providing anesthesia services[1] ... and had opened her own pain management practice and was doing pain management on a full time basis by August 1, 2000." Petitioner's Appendix ("Pet. App."), p. 23. The Seventh Circuit Court agreed. *Id.* at 3.

Kochert was not precluded from practicing inpatient and obstetrical anesthesiology at St. Elizabeth Medical Center when her subcontract with Anesthesiology Associates to provide services at Home Hospital was not

[1] The district court adopted Kochert's definition of "anesthesia services" as those anesthesia services provided to inpatient surgical and obstetrical patients, but not including anesthesia services provided to outpatients. Pet. App., 28. The exclusive services contracts at issue covered both inpatient and outpatient services.

renewed. Almost a year before the GLHS exclusive services contract was awarded to Anesthesiology Associates, Kochert had left the practice of anesthesiology and opened her own full-time pain management practice. *Id.*

Petitioner's conclusory statement that she "was excluded from the market" in March, 1998, when her subcontract with Anesthesiology Associates expired, is also erroneous. Petition, 7. After March 1, 1998, when her subcontract at Home Hospital expired, Kochert conceded that she continued to practice the full range of anesthesia services at St. Elizabeth Medical Center until at least August, 2000, and could have continued to do so after that, but for her own choice to open her own a competing pain management practice. *See* Pet. App., 3, 23. From March 29, 1998, through June 1, 2001, Lafayette Anesthesiologists held the exclusive contract to provide anesthesia services at St. Elizabeth Medical Center. *See* Pet. App., 2, 20-21.

Petitioner's unsupported statement that Dr. Kenneth J. Bochenek (president of Anesthesiology Associates) and Mr. John Walling (former chief executive officer of GLHS) "testified to the non-existence of the exclusive arrangement . . . as of March 1, 1998," is wrong. Petition at 7. To the contrary, Dr. Bochenek and Mr. Walling testified that the exclusive services arrangement between Anesthesiology Associates and Home Hospital was continuously renewed from 1994 through 2001, and the district court expressly rejected all of Kochert's contentions about the lapse in renewals of this agreement on the grounds of *res judicata*. Pet. App., 32-33. Kochert's claims regarding non-renewal of this contract were also litigated by her against the Respondents in the Indiana, Tippecanoe Circuit Court,

under Cause No. 79C01-0001-CP-0007, and decided against her on summary judgment.[2] Pet. App., 20, 32-33.[3]

Further, the Seventh Circuit court noted that it "had serious doubts about the usefulness of Kochert's evidence." Pet. App., 17. In affirming the district court's summary judgment on all of Kochert's antitrust claims, the Circuit court stated, "no reasonable jury, examining Kochert's evidence of diminished quality, could find it credible as proof of such diminution. Kochert has not introduced any evidence that would allow a jury to compare the quality of care prior to defendants' anticompetitive acts with the quality of care after these acts." *Id.*; *see also id.* at 27 (Kochert failed to demonstrate effects on price or quality "that occurred after the exercise of market power.").

Summary judgment was correctly granted because the Petitioner lacks antitrust standing and failed to come forth with admissible evidence to sustain each element of her claims. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The district court found that Petitioner failed to meet this burden and that the Respondents

---

[2] The district court noted that this is Kochert's third lawsuit against the Respondents concerning the expiration of her 1998 Anesthesiology Associates subcontract. Pet. App., 20, 32-33.

[3] Petitioner's statements about "animus between her and Dr. Bochenek and Mr. Walling over patient care issues" (Petition, 7) are unsupported in the record, but are superfluous and not material to any issue in dispute. *See also* Petitioner's statement that "animus" against her "forced [her] to look for other work in the field of medicine besides anesthesiology as early as March 1, 1998." *Id.* No evidence in the record supports this statement regarding unspecified "animus." Rather, the evidence shows that Kochert made a personal decision to open her own pain management practice, and that as a result her annual earnings increased. Pet. App., 123.

were entitled to summary judgment as a matter of law. Pet. App., 24. The Circuit court affirmed. *Id.* at 17.

ARGUMENT IN OPPOSITION TO THE PETITION

Kochert contends that the courts below confused the standard for admissibility of evidence under FED. R. EVID. 702 with the summary judgment standard under FED. R. CIV. P. 56(c),[4] and that this Court should instruct the lower courts to provide more detailed explanations in ruling on such motions. Petition, 11-12. To the contrary, the lower courts were quite clear in their reasoning and made separate, detailed entries correctly applying the relevant standards for the admissibility of the expert testimony and the entry of summary judgment.

Kochert was unable to establish her standing as a proper antitrust plaintiff because she did not suffer an antitrust injury of the type the antitrust laws were intended to redress and which flowed directly from the illegal acts she claims were committed by the Respondents, and she did not demonstrate that she would be an efficient enforcer of the antitrust laws. The district court made specific findings as to legal deficiencies of each of Kochert's Sherman Act claims. Pet. App., 24-34. The Seventh Circuit expressed its "serious doubts" about Kochert's claims and evidence, but did not reach that part of the analysis because it affirmed Kochert's lack of antitrust standing. *Id.* at 17.

[4] Kochert refers to the summary judgment standard as the "sufficiency" standard. Petition, 12.

A. The Trial Court's Admission Of A Party's Expert Testimony Under *Daubert* Does Not Preclude The Court's Subsequent Entry Of Summary Judgment Against That Party.

Kochert argues that her Petition should be granted because lower courts, including those in this instance, often confuse the standards for admissibility of expert testimony with the summary judgment standards for sufficiency of the evidence. Petition, 15-16. Kochert argues that in confounding the tests for admissibility of expert testimony under *Daubert* with the standard for granting summary judgment, the lower courts went too far and decided a material question of fact that should have been reserved for the jury. *Id.* at 13. Even after admitting the reports and testimony of Kochert's experts, the district court correctly granted summary judgment because Kochert failed to sustain each element of her claims with admissible evidence, and Respondents were entitled to judgment as a matter of law. Pet. App., 17, 34.

1. Admissible, Expert Testimony Is Not Necessarily Sufficient Evidence To Preclude Entry Of Summary Judgment As A Matter Of Law.

While it may be true as Kochert states that when "all of the essential parts of a party's case pass *Daubert,* this will virtually always be enough to proceed to trial" (*id.* at 13-14), the situation here does not lead to the same conclusion. When a party presents proof of some, but not all, of the essential parts of her case, even if that proof passes muster under *Daubert,* the missing elements will entitle the moving party to summary judgment as a matter of law. The *Daubert* Court expressly noted that summary judgment may be entered by a district court

even after admitting testimony of an expert offered by the non moving party. 509 U.S. at 596.[5] The point was reiterated in the concurring opinion of Justice Breyer in *General Electric Co. v. Joiner,* 522 U.S. 136, 148, n.9 (1997). Having twice eschewed the more stringent general acceptance test of *Frye v. United States,* 293 F. 1013 (1923), and expressed its view that the standards for admissibility of expert testimony should be applied so as to admit testimony that is relevant and reliable, leaving trial courts to use "more conventional devices" such as directed verdict and summary judgment, where the evidence is insufficient to sustain a reasonable juror's conclusion in favor the non moving party, it would be incongruous for this Court now to adopt Kochert's view that having once admitted expert testimony, the trial court is precluded from assessing the sufficiency of that expert testimony when presented with a motion for summary judgment. The conclusion that expert testimony is admissible does not lead to the inevitable conclusion that the expert's testimony is sufficient to preclude entry of summary judgment. *Daubert,* 509 U.S. at 596. It is Kochert, and not the lower courts, who confuses the standards for admissibility and sufficiency.

The Seventh Circuit's Opinion is not in conflict with *In re Eastern & So. Dist. Asbestos Litig.,* 52 F.3d 1124,

---

[5] "[I]n the event the trial court concludes the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, FED. R. CIV. P. 50(a), and likewise to grant summary judgment, FED. R. CIV. P. 56. . . . These conventional devices, rather than wholesale exclusion under an uncompromising general acceptance test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Daubert*, 509 U.S. at 596.

1132-33 (2d Cir. 1995). The Second Circuit court found specific instances where the district court invaded the role of the fact finder. *Id.* at 1128-30. In Kochert's case, no lower court weighed the evidence, made a credibility decision or decided a material question of genuinely disputed fact. Finding that expert testimony passes the relevancy prong of the *Daubert* test is not tantamount to finding that there is a material fact in dispute sufficient to preclude entry of summary judgment as a matter of law. The standards for admissibility under FED. R. EVID. 702 and for sufficiency under FED. R. CIV. P. 56(c) are distinct, and were not conflated by the lower courts as Kochert contends.

2. Kochert's Expert Witness Testimony Was Not Sufficient To Forestall Summary Judgment.

Contrary to Kochert's assertion (Petition, 14), Kochert's experts did not provide admissible evidence sufficient to establish her antitrust standing, and thus she failed to establish all of the essential elements of her claims. *See* Pet. App., 17. When expert testimony is admitted, it is not invariably enough to create a genuine dispute of material fact. Kochert admits that even when expert testimony has been admitted, if the non moving party has not produced any evidence (whether expert testimony or other evidence) on an element of the claim, summary judgment may be properly granted. Petition, 14. Kochert postulates that summary judgment is frequently entered following a district court's ruling that a party's expert's opinions are inadmissible under Rule 702, but contends that the converse of that situation, while rare, should not be permitted because to do so allows the trial court to usurp the role of jury. *Id.* Kochert's reasoning is flawed

because she assumes that all such situations involve the improper weighing of evidence by a district court. Further, admitted expert testimony, even if material, when viewed in the context of all of the evidence before the trial court, may not be sufficient to defeat summary judgment.

In addition to the Seventh Circuit's Opinion in this case, courts in the Sixth, Eighth, Ninth and Eleventh Circuits have held that admission of a party's expert testimony is not inevitably fatal to the opposing party's motion for summary judgment.[6] Kochert claims that her case is different, and that she presented admissible expert testimony on all facts necessary to sustain her antitrust claims. Petition, 15. The Record does not sustain Kochert's claims.

In *Bailey,* the Eleventh Circuit court held that, even assuming the expert's analysis was admissible and correct, it failed as a matter of law to create a sufficient disputed question of fact as to causation, and thus the court affirmed the entry of summary judgment for the defendant. 284 F.3d 1237, 1257 (11th Cir. 2002). The Ninth Circuit reached a similar conclusion in *Rebel Oil,* and held, "The *Daubert* ruling did not require the district court to deny ARCO's motion for summary judgment." 146 F.3d 1088, 1097 (9th Cir.), *cert. den.*, 525 U.S. 1017 (1988). "An expert witness may be qualified to testify even though the

---

[6] *Barnes v. Kerr Corp.,* 418 F.3d 583 (6th Cir. 2005) ("Even with this expert testimony, however, Barnes failed to establish causation and failed to raise a genuine issue of material fact. . . ."); *Morgan v. United Parcel Service of Am., Inc.,* 380 F.3d 459 (8th Cir.), *cert. den.*, 544 U.S. 999 (2004) ("Admissible regressions, however, do not necessarily mean summary judgment is inappropriate."); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.,* 146 F.3d 1088 (9th Cir.), *cert. den.*, 525 U.S. 1017 (1998); *Bailey v. Allgas, Inc.,* 284 F.3d 1237 (11th Cir. 2002).

expert's conclusions are legally incorrect." *Id.* (citing *General Elec.*, 522 U.S. at 146). In Kochert's case, the district court correctly reached the same result. Pet. App., 29-30, n.4.

Based on the conclusion of the Second Circuit in *Eastern & So. Dist. Asbestos Litig.* that the district court improperly weighed the evidence, Kochert assumes that all courts, including the lower courts in this case, simply will not or cannot distinguish between admissibility and sufficiency of expert evidence. Kochert misstates the relevant standards of review and the district court holdings. "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Bailey*, 284 F.3d at 1243 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

It is appropriate for a court to evaluate the sufficiency of the evidence on a summary judgment motion. The Seventh Circuit is correct that Federal Rule of Civil Procedure 56(c) "allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions." *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476 (7th Cir.), *cert. den.*, 488 U.S. 852 (1988). Further, the summary judgment inquiry requires district courts "to engage in a qualitative review of the claim that goes beyond a minimum quantitative sufficiency of the evidence type of review." *Id.* Thus, if

"the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id.* (internal quotations and citation omitted). Otherwise, it would be "a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained." *Mason v. Continental Ill. Nat'l Bank,* 704 F.2d 361, 367 (7th Cir. 1983).

Second, in finding that Kochert's expert opinions met the relevancy and reliability standards under *Daubert*, the district court focused "solely on principles and methodology, not on the conclusions [the experts] generate." Pet. App., 29-30, n.4; *see also id.* at 36 (Memorandum and Order on admissibility of Seaman opinion). The district court's rulings are consistent with this Court's instructions in *Daubert* and the Federal Rules of Evidence. The district court stated that in making its rulings on the admissibility of the parties' expert evidence, "it did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact." *Id.* at 19. The district court properly addressed the sufficiency of Kochert's experts' opinions in its ruling on the motions for summary judgment.

The district court made detailed findings concerning Kochert's inability to show direct anticompetitive effects on the price, quality or quantity of anesthesia services. Pet. App., 24, 26-28. Kochert failed to offer any evidence that demonstrated the anticompetitive effects she claimed were attributable to an exercise of market power by the Respondents. *Id.* at 28. The district court's conclusions are consistent with *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986), and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). The district court admitted the

testimony and repor[illegible] Kochert's expert, Dr. Bruce Seaman, but found that K[illegible]ert had failed, as a matter of law, to define a relevant geographic market. Pet. App., 28-31.

This case illustrates Justice Blackmun's point that application by district courts of the broader and more flexible standards for admissibility of expert testimony under *Daubert* simply does not affect application of other rules or the summary judgment analysis. 509 U.S. at 596; *accord General Elec. v. Joiner,* 522 U.S. at 142-43. This case does not present any reason to alter such well-settled principles.

3. The Lower Courts Provided Detailed And Clear Explanations Of Their Rulings, And There Is No Need For Further Instruction From This Court.

Kochert also contends that this Court should grant her Petition in order to instruct lower courts to "make clear the bases for their rulings" when there is a dispute about the admissibility of expert testimony and a motion for summary judgment presented to a district court. Pet. App., 11-12.[7] However, the rulings in this case are clear. The Seventh Circuit affirmed the December 29, 2004, entry of summary judgment by the district court in a well-reasoned, seventeen-page Opinion. Pet. App., 1-17. The district court issued a detailed, seventeen-page Memorandum and Order on December 29, 2004 (Pet. App., 18-34),

---

[7] Kochert did not raise this issue in the Seventh Circuit, and arguably has waived the right to present the issue to this Court. *See Air Courier Conf. of Am. v. American Postal Workers Union, AFL-CIO,* 498 U.S. 517, 522 (1991).

explaining its reasoning for granting summary judgment on all counts of the Petitioner's Amended Complaint. The district court also entered detailed Memoranda and Orders regarding each of the *Daubert* challenges to her experts. Pet. App., 35-69. There is no need for further instruction to the lower courts based on the record presented here.

B. Kochert Lacks Antitrust Standing.

The lower courts correctly held that Kochert lacks antitrust standing as a matter of law. Standing under the Sherman Act goes beyond the United States Constitution Article III requirements, and requires a determination that "the plaintiff is the proper party to bring a private antitrust action." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480-81 (7th Cir. 2002), *reh'g and reh'g en banc den.* (2003); *see also Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535 n.31 (1983). The two requirements for antitrust standing are the presence of an "antitrust injury" and a determination that the plaintiff is an "efficient antitrust enforcer." *Loeb,* 306 F.3d at 480-81. The district court found that Kochert lacks antitrust standing because she was no longer practicing anesthesiology by the time the acts about which she complains occurred (Pet. App., 23), and she alleged injuries personal to her as a competitor, but not injuries to competition as a whole. *Id.* at 24. Kochert is not an efficient enforcer of the Sherman Act. *Id.* at 24, 15-16.

1. Kochert Did Not Suffer An Antitrust Injury.

In *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, this Court limited the application of Section 4 of the Clayton Act (15 U.S.C. § 4) by requiring the plaintiff to establish

more than injury caused by the defendant's conduct; the plaintiff must show that she has suffered an injury of the type the antitrust laws were designed to prevent and that her injury directly flows from that which makes the defendant's conduct illegal under the antitrust laws. 429 U.S. 477, 488-89 (1977). There must be a direct causal link between an injury to an interest of the plaintiff which is protected by the antitrust laws and the defendant's conduct in violation of the antitrust laws. *Id.; see also Greater Rockford Energy & Technology Co. v. Shell Oil Co.,* 998 F.2d 391, 395 (7th Cir. 1993), *cert. den.,* 510 U.S. 1111 (1994). A private plaintiff can recover on an antitrust claim only where the plaintiff's loss stems directly from "the competition-reducing aspect of the effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 344 (1990). The district court correctly held that the loss Kochert claimed (reduced anesthesia income and increased expenses for her pain management practice) were not the type of interest protected by the antitrust laws and did not stem directly from the anticompetitive acts or the effects of the violations she claimed. App. Pet., 24.

At the outset, Kochert had difficulty establishing the requisite antitrust injury because the alleged precipitating event – the expiration of her 1998 Anesthesiology Associates subcontract – is not itself a violation of the antitrust laws. Kochert admitted this. Pet. App., 23. Kochert argued to the lower courts that the confluence of a series events: the March 1998 expiration of her Anesthesiology Associates subcontract; the 1999 GLHS decision to close the St. Elizabeth Medical Center obstetrics unit; and the 2001 decision by GLHS to use a single anesthesia provider at Home Hospital and St. Elizabeth Medical Center,

"create[d] anticompetitive concerns that might not have been present had those three events not been combined." *Id.* (quoting Kochert's Summary Judgment Brief at p.7). Whether viewed singly or together, none of these "concerns" caused Kochert to suffer an antitrust injury.

Kochert continued to practice anesthesia at St. Elizabeth Medical Center from 1998 until August, 2000, when she devoted herself exclusively to pain management. From 1998 through the present, Lafayette Anesthesiologists doctors continued to practice the full range of anesthesia services at St. Elizabeth Medical Center or other locations in the market area Kochert defined. Kochert was never excluded from the geographic or product markets defined by her own expert. The evidence Kochert presented to the district court showed that long before June 1, 2001, when GLHS decided to use a single anesthesia contractor for both Home Hospital and St. Elizabeth Medical Center, Kochert was no longer practicing anesthesia.

Kochert first brought an action against the Respondents in 1998 claiming Anesthesiology Associates' decision not to renew her subcontract was a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e).[8] When that case was dismissed, Kochert sued the Respondents in Indiana state court alleging Anesthesiology Associates' decision not to renew her subcontract was a breach of contract or tortious interference with her business relationship with Home Hospital.[9] The district court was correct that Kochert's damages expert, Cornelius Hoffman,

---

[8] *Carolyn Kochert, M.D. v. Lafayette Home Hospital, Inc., et al.*, Cause No. 4:98-CV-0053 AS (N.D. Ind. 2000).

[9] *Carolyn Kochert, M.D. v. Lafayette Home Hospital, Inc., et al.*, Tippecanoe Circuit Court, Cause No. 79C01-0001-CP-0007.

"determined that all of Kochert's damages were caused by the non-renewal of her subcontract with Anesthesiology Associates in 1998." Pet. App., 23. Kochert claimed damages in this case based on the expenses she incurred to open her own pain management practice in 1999 and 2000, but even her own expert admitted that those expenses were incurred before GLHS awarded a single contract to Anesthesiology Associates for both Lafayette hospital campuses. *Id.*

Thus, Kochert failed to establish any direct causal link between the injury she alleged and Anesthesiology Associates' alleged wrongful acts. *See Associated Gen. Contractors,* 459 U.S. at 544; *Greater Rockford,* 998 F.2d at 396 (plaintiff must show injury from the anticompetitive effects she claims); *see also Sanner v. Board of Trade of the City of Chicago,* 62 F.3d 918, 922 (7th Cir. 1995). Even ignoring the lack of temporal and causal connections between the violations and the injuries she claims, Kochert could not show under any set of facts that she was directly damaged by an anticompetitive effect on the price, quantity or quality of anesthesia services. Pet. App., 23-24. Admission of Kochert's experts' opinions could not change the fact that Kochert is neither a consumer, nor a provider, of anesthesia services. Pet. App., 24.

2. Kochert Did Not Demonstrate Injury to Competition.

Kochert's claims of *per se* antitrust violations failed as a matter of law. *See* Pet. App., 25; *Jefferson Parish,* 466 U.S. at 15. Kochert also failed to establish antitrust violations under the Rule of Reason. Pet. App., 25-27. At best, Kochert suffered mere economic loss, not an injury to competition. *See Brunswick,* 429 U.S. at 488-89. Kochert

failed to demonstrate an actual, adverse effect on competition as a whole in the relevant geographic and product markets. *See Indiana Fed. of Dentists,* 476 U.S. at 460-61. Her attempt to show that she, as an individual competitor, had been harmed was not sufficient to demonstrate damage to competition as a whole, even assuming that she suffered lost profits or diminished income as she claimed. Kochert simply failed to demonstrate injury beyond her economic loss that stemmed from an illegal exercise of market power by the Respondents. Pet. App., 27. Kochert was unable as a matter of law to sustain any of the antitrust violations she alleged.[10] *See HTI Health Servs., Inc. v. Quorum Health Group, Inc.,* 960 F. Supp. 1104, 1111 (S.D. Miss. 1997); *Davies v. Genesis Med. Ctr.,* 994 F. Supp. 1078, 1093 (S.D. Iowa 1998) (rejecting anesthesiologist's antitrust claims based on hospital exclusive service agreement). Because antitrust laws are designed to protect

---

[10] Numerous courts have rejected antitrust claims similar to Kochert's. *Jefferson Parish,* 466 U.S. at 30; *Oksanen v. Page Mem'l Hosp.,* 945 F.2d 696, 708 (4th Cir. 1991), *cert. den.,* 502 U.S. 1074 (1992); *Ball Mem'l Hosp. v. Mutual Hosp. Ins., Inc.,* 784 F.2d 1325, 1338 (7th Cir. 1986); *Davies v. Genesis Med. Ctr.,* 994 F. Supp. 1078, 1093 (S.D. Iowa 1998). Cases allowing hospitals to enter into exclusive services contracts are legion. *Hager v. Venice Hosp., Inc.,* 944 F. Supp. 1530, 1537 (M.D. Fla. 1996) (collecting cases), *aff'd,* 132 F.3d 1461 (11th Cir. 1997); *see also BCB Anesthesia Care v. Passavant Mem'l Area Hosp.,* 36 F.3d 664, 667-69 (7th Cir. 1994). Removal of a single doctor from a local market is not evidence of an antitrust injury. *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic,* 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. den.,* 516 U.S. 1184 (1996). Anesthesiology Associates was not required to offer a subcontract to every anesthesiologist who wants one. *See Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.,* 917 F. Supp. 1282, 1301 (N.D. Ill. 1996). ("Injecting the powerful medicine of the Sherman Act into the [plaintiff's] staffing dispute would be like treating a hangnail with amputation of the finger."). This case does not present any unique situation or other reason why this Court should not let the rulings of the lower courts stand.

competition as a whole, not individual competitors from economic loss, Kochert's claims failed. *See Atlantic Richfield,* 495 U.S. at 338. Kochert lacks antitrust standing as a matter of law, and this Court should deny the petition for a writ of *certiorari*.

3. Kochert Is Not An Efficient Enforcer Of The Antitrust Laws.

The lower courts found that even if an antitrust injury were found to exist, Kochert is not an "efficient enforcer" of the antitrust laws, *i.e.,* a proper antitrust plaintiff. Those with a more direct injury are more "efficient enforcers" of the antitrust laws. Patients, insurers or the government may be efficient enforcers, but not a disappointed competitor like Kochert. *See Davies,* 994 F. Supp. at 1096 (collecting cases); *see also Associated Gen. Contractors*, 459 U.S. at 544-45 (citing *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737-38 (1977)).

Kochert's only response in the lower courts was to state that competitors *can be* efficient enforcers. However, Kochert made no affirmative showing that *she* would be an efficient enforcer of the antitrust laws in this case. The Seventh Circuit was particularly troubled by the lack of directness between the injury Kochert claimed and the market restraint at issue. Pet. App., 15 (discussing *Sanner*, 62 F.3d at 927). Kochert is admittedly not a consumer of anesthesia services. Kochert has not been a provider of anesthesia services since at least the summer of 2000. The Seventh Circuit found the causal connection between Kochert's injury and the antitrust violation "tenuous at best." Pet. App., 16. Applying this Court's analysis in *Associated Gen. Contractors* (459 U.S. at 537-46), the

Seventh Circuit found no cause to "tip the scales away from our ultimate conclusion. Kochert does not have antitrust standing." Pet. App., 16. As someone covetous of, and a former party to, the very exclusive services contracts she challenged as illegal, Kochert's motivation is nothing more than her own self interest. Kochert's interest is simply in reshuffling competitors, not correcting an antitrust breach. *See Balaklaw v. Lovell,* 14 F.3d 793, 799 (2d Cir. 1994).

Because Kochert did not, and could not, as a matter of law establish the threshold antitrust standing requirements, the lower courts were correct in granting summary judgment for the Respondents. The Petitioner has presented no compelling reason to issue a writ of *certiorari,* and the rulings of the lower courts should stand.

CONCLUSION

For all the foregoing reasons, the Petition for writ of *certiorari* should be denied.

Respectfully submitted,

JUDY L. WOODS
Counsel of Record
BOSE MCKINNEY & EVANS LLP
2700 First Indiana Plaza
135 N. Pennsylvania Street
Indianapolis, IN 46204
(317) 684-5000
(317) 684-5173 (fax)
Jwoods@boselaw.com

Counsel for Respondent,
Anesthesiology Associates, P.C.

No. 06-822

In The Supreme Court of the United States

CAROLYN KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., JOHN WALLING, and ANESTHESIOLOGY ASSOCIATES, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS GREATER LAFAYETTE HEALTH SERVICES, INC. AND JOHN WALLING

LARRY R. FISHER
Counsel of Record
STUART & BRANIGIN LLP
300 Main Street, Suite 900
P.O. Box 1010
Lafayette, IN 47902-1010
Telephone: 765-423-1561
Facsimile: 765-742-8175

Counsel for the Respondents, Greater Lafayette Health Services, Inc. and John Walling

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does the Petition present any compelling reason for certiorari review when both the Seventh Circuit Court of Appeals and the district court held that summary judgment should have been granted to the Respondents because the evidence proffered by Petitioner failed to create any genuine issue of material fact that she suffered an antitrust injury or had antitrust standing and the testimony of Petitioner's expert witnesses was neither probative nor material to the resolution of these issues?

2. Does the Petitioner confuse the differing standards for the admissibility of expert testimony under FED. R. EVID. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) with the production requirements under FED. R. CIV. P. 56 and this Court's prior opinions governing the evidentiary standards for summary judgments?

3. Did the Petitioner waive the second "Question Presented" in her Petition by failing to present the issue that "courts have an obligation to give reasons . . . why admissible expert evidence . . . is not sufficient to avoid summary judgment" [Petition at i] to the Seventh Circuit Court of Appeals?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent, Greater Lafayette Health Services, Inc., is an Indiana domestic nonprofit corporation. The Sisters of St. Francis Health Services, Inc., an Indiana privately held nonprofit corporation, is the sole member of Greater Lafayette Health Services, Inc.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
SUMMARY OF THE REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE PETITION	11
A. The District Court and the Seventh Circuit Court of Appeals Properly Applied the Standards Under Rule 56 and This Court's Prior Opinions	11
B. Kochert Waived the Second Question Presented in Her Petition by First Failing to Advance the Issue in the Seventh Circuit	17
C. There Is No Obligation on Lower Courts to Offer Explanations of Reasons Why Certain Evidence Is Insufficient to Create a Genuine Issue of Material Fact	18
D. Kochert Failed to Establish any Genuine Issue of Material Fact on the Issues of Antitrust Injury and Antitrust Standing	20
E. Kochert Also Failed to Establish any Genuine Issue of Material Fact on Her Remaining Antitrust Claims	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 17

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)...14, 19

Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002)..... 14

Barnes v. Kerr Corp., 418 F.3d 583 (6th Cir. 2005) 13

Bell Atlantic v. Twombly, 126 S.Ct. 2965, *cert. granted* (6-26-2006)..... 16

Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)..... 25

Brown Shoe Co. v. U.S., 370 U.S. 294 (1962)..... 24

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)..... 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 19

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 18

City of Springfield v. Kibbe, 480 U.S. 257 (1987)..... 17

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)..... *passim*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)..... 14

Duignan v. U.S., 274 U.S. 195 (1927)..... 17

Fed. Trade Comm'n v. Freeman Hosp., 69 F.3d 260 (8th Cir. 1995) 24

Flegel v. Christian Hosp., 4 F.3d 682 (8th Cir. 1993) 24

Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083 (10th Cir. 2000)..... 19

TABLE OF AUTHORITIES – Continued

Page

Maiorana v. U.S. Mineral Products Co. (In Re Joint Eastern & Southern Dis. Asbestos Litig.), 52 F.3d 1124 (2nd Cir. 1995) 15, 16

Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 5 F. Supp. 2d 694, 707 (D. Minn. 1998), *aff'd*, 28 F.3d 655 (8th Cir. 2000) 24

Morgan v. United Parcel Service of America, Inc., 380 F.3d 459 (8th Cir. 2004) 14

Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 17

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088 (9th Cir. 1998) 14

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 14, 15

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 18

Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150, 433 F.3d 1024 (7th Cir. 2006) 20

Wildbur v. Arco Chem. Co., 974 F.2d 631 (5th Cir. 1992) 19

RULES

FED. R. CIV. P. 8 16

FED. R. CIV. P. 12 19

FED. R. CIV. P. 50(a) 15

FED. R. CIV. P. 52(a) 15, 19

FED. R. CIV. P. 56 ..... *passim*

FED. R. EVID. 702 ..... 1, 2, 12, 15, 26

TABLE OF AUTHORITIES – Continued

Page

SUP. CT. R. 10 1

SUP. CT. R. 14.2 10

SECONDARY LEGAL RESOURCES

Andrew I. Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 702 (1997) 13

CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, p. 300 (2d ed. 1995) 15

Opinion and Expert Testimony in Federal and State Courts, ALI-ABA Course of Study Materials, MANUAL FOR COMPLEX LITIGATION, (4th ed.) § 23.25, pp. 202-203 (2006) 16

SUMMARY OF THE REASONS FOR DENYING THE PETITION

The petitioner, Carolyn Kochert, M.D. ("Kochert") lost on summary judgment. Contrary to Kochert's arguments, this case does not present any unique issue regarding the relationship between admissibility of evidence under Rule 702 of the Federal Rules of Evidence and "sufficiency" under Rule 56 of the Federal Rules of Civil Procedure. Although Kochert attempts to show some "tension" between these two rules, the facts and evidence before the lower courts show that Kochert simply failed to establish a genuine issue of material fact on the elements of her case, an appropriate and frequent outcome when a case does not merit further attention by a district court.

The district court determined that there was no genuine issue of material fact on several essential elements of Kochert's case, and the Seventh Circuit affirmed the district court on the basis that Kochert did not have any antitrust injury and did not have antitrust standing. Because there was no genuine issue of material fact, summary judgment was properly granted and affirmed. The opinion of the Seventh Circuit is based, not on any "reweighing" of the evidence, but upon undisputed facts. There is no significant issue of law or other compelling reason, as contemplated by Supreme Court Rule 10, for the Petition for Writ of Certiorari to be granted. The decision of the Seventh Circuit does not conflict with any other circuit court decision, does not decide an important federal question, and does not depart from the accepted and usual course of judicial proceedings. The issues decided by the Seventh Circuit simply do not meet the standards that guide this Court's exercise of its certiorari jurisdiction.

Although the district court denied the Defendants' *Daubert*[1] motions and found that the testimony of Kochert's experts was admissible, that ruling did not assure Kochert that there would be genuine issues of material fact. The expert testimony offered by Kochert may have been admissible, but it did not establish any genuine issue of material fact. This Court's own opinions have previously clarified the standards surrounding federal summary judgment practice. The standard is not merely that certain evidence meets or fails *Daubert*. The evidence before the district court must create a genuine issue of material fact on every element of a plaintiff's case. The district court and Seventh Circuit applied the basic rules of law regarding summary judgment under Rule 56 and reached the correct result.

Kochert's argument that lower courts have an obligation to explain their reasons for granting summary judgment in the face of admitted expert testimony is waived because Kochert did not first present this issue or argument in support of it to the Seventh Circuit. Although Kochert did raise and argue the issue regarding the different standards between Rule 702 and Rule 56, she never presented any issue of the district court's obligation and alleged failure to explain its reasoning in more detail. In keeping with this Court's practice of not reviewing issues which have not first been considered by the court of appeals, certiorari review of this issue should be denied.

---

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Even if the issue had not been waived, both the Seventh Circuit and the district court provided well-reasoned and detailed analyses of the facts and the law to support their decisions, and nothing more is mandated or required by Rule 56. The decision of the Seventh Circuit shows precisely the reasons for its opinion. Kochert lacked antitrust standing and did not sustain an antitrust injury. The testimony of Kochert's experts was neither relevant nor material to the resolution of these issues, nor did such testimony establish any genuine issue of material fact. The undisputed evidence, including the testimony of Kochert's expert witnesses, showed that two anesthesiology groups were in direct competition with each other in Tippecanoe County until June 1, 2001, and therefore there could not have been any harm to competition before then. Kochert began practicing pain management on a full time basis in August, 2000. Kochert could not have sustained any antitrust injury in June 2001 because she was no longer a competitor in the practice of anesthesiology. The undisputed facts established that Kochert did not have any antitrust injury as a matter of law.

Neither of the lower courts "weighed" any evidence in order to find that Kochert lacked antitrust standing. The undisputed evidence demonstrated that there were other persons including patients, insurance carriers, and physicians who were in the practice of anesthesiology who would have been more efficient enforcers of any antitrust claim than Kochert.

The lower courts also did not weigh the evidence regarding any of the remaining issues, including the geographic market and Kochert's damages experts. Because the Seventh Circuit affirmed the district court on the issues of antitrust standing and antitrust injury, the

expert opinions regarding geographic market and damages were not material to the Seventh Circuit's decision. In any event, the testimony of these experts was insufficient to create any genuine issue of material fact. The Petition for Writ of Certiorari therefore presents no novel or compelling issues, and the Petition should be denied.

STATEMENT OF THE CASE

Anesthesiology Associates, Inc. ("AA") and Home Hospital ("HH") entered into a contract effective on September 1, 1994 for AA to be the exclusive provider of surgical and obstetrical anesthesia services at HH. The exclusive agreement was in effect continuously through the time the district court granted summary judgment in favor of the Defendants. Pet. App. at 2-3.

After the exclusive agreement was executed, AA offered each anesthesiologist who had privileges at HH, including Kochert, a subcontract to provide surgical and obstetrical anesthesia services at HH. Pet. App. at 2. On December 3, 1997, the members of AA voted unanimously not to extend Kochert's subcontract after it expired on March 1, 1998 because of Kochert's lack of civility and history of closing areas for which she was responsible which could have jeopardized AA's exclusive contract with HH. Resp. App. 1-3.

Prior to 1998, HH and St. Elizabeth Medical Center ("SEMC") were the two hospitals in Tippecanoe County where patients could receive inpatient and obstetrical anesthesia services. The two competing hospitals were combined in 1998 to form Greater Lafayette Health

Services, Inc. ("GLHS"). Pet. App. at 2. Lafayette Anesthesiologists ("LA") was formed in 1995 and Kochert became a member of this practice group. Resp. App. at 6-7. On June 1, 1998, LA entered into an exclusive contract to provide surgical and obstetrical anesthesia services to patients at SEMC. Pet. App. at 2. Thus, on June 1, 1998, LA, including Kochert, was a competitor with AA for outpatient surgical, inpatient surgical, and obstetrical anesthesia services for patients receiving such services in Tippecanoe County, and Kochert was herself the beneficiary of an exclusive contract for anesthesiology services.

Kochert had a longstanding interest in doing pain management and discussed her intention of developing a pain management practice on a full time basis with LA. Kochert became board certified in pain management in 1999. Kochert opened her own pain management practice, Advanced Pain Management ("APM"), on August 23, 1999. Resp. App. at 8-9; Resp. App. at 22-23.

Between 1999 and 2000, pain management accounted for an increasing percentage of Kochert's practice. By August 2000, Kochert devoted herself on a full time basis to her pain management practice. Pet. App. at 3. Kochert effectively ceased performing anesthesia services in August, 2000. Kochert was removed from the LA schedule for anesthesia services to patients at SEMC beginning in August, 2000, at her own request, because she felt that her pain management practice was growing and she would be unable to continue working on the anesthesia schedule and still continue to increase her pain management practice. Resp. App. at 23-24.

Kochert applied for privileges at the Women's Hospital in Indianapolis on August 18, 2000. Kochert only sought

privileges for pain management and stated on her application, "I do not intend to do surgical anesthesia." Resp. App. at 25-26, 28-29. Kochert terminated her membership in LA in the summer of 2000. Resp. App. at 22. After Kochert left LA and went into pain management on a full time basis, she was not in competition with either LA or AA because she was no longer providing anesthesia services to patients. Resp. App. at 14.

GLHS advised LA in February, 2001, that GLHS had decided not to renew LA's exclusive contract. GLHS awarded the exclusive contract for anesthesia services at SEMC to AA in 2001. Pet. App. at 2.

The evidence in this case failed to demonstrate any actual harm to competition due to any exercise of market power to increase the nominal price of anesthesia services. Pet. App. at 27. In March, 1998, AA and LA each had a standard rate for their services of $43 per unit. Resp. App. at 11, 5. AA increased its rate to $48 per unit in 1999. Resp. App. at 5. LA increased its rate to $48 per unit in 1998 or 1999. Resp. App. at 11. AA increased its standard rate to $53 on March 6, 2000. Resp. App. at 5. LA increased its standard rate to $52 per unit in the fall of 2001, and to $55 per unit on March 1, 2003. Resp. App. at 10-11, 20-21.

Although there were some anecdotal reports of incidents where the anesthesia care was substandard, there was no evidence to show there was any reduction in the quality of care provided by AA after March 1, 1998. Pet. App. at 27. Kochert's expert witnesses agreed they had no information that there was any reduction in the quality of care since January 1, 1998. Resp. App. at 33, 36-37.

There are numerous misstatements of fact in the Petitioner's brief. Kochert asserts at page 6 of her brief that, "Throughout the entire time period of this case, through the filing of this Petition, petitioner remains in Lafayette as a competitor in anesthesiology." In fact, Kochert ceased being a competitor in anesthesiology when she decided to pursue her pain management practice on a full-time basis in August, 2000. Pet. App. at 3; Resp. App. at 26-27, 30-31.

Kochert asserts at page 7 that March 1, 1998 was "the first occasion that a competitor in anesthesiology was excluded from the market." In fact, Kochert was not excluded from competition in 1998 as Kochert and the other LA doctors were direct competitors with AA in Tippecanoe County when they were awarded the exclusive contract at SEMC in 1998. The LA doctors also had privileges to provide anesthesia services at the other hospitals in the counties surrounding Tippecanoe. Resp. App. at 12-13.

Kochert asserts at page 7 that Walling and Bochenek "testified to the non-existence of the exclusive arrangement requiring these subcontracts as of March 1, 1998." In fact, the evidence showed that the exclusive contract had been renewed and was in force in 1998. Pet. App. at 2-3.

Kochert asserts at page 7 that as "a result of the animus that occurred with Petitioner, and the operation of the exclusive contract, Petitioner was forced to look for other work in the field of medicine besides anesthesiology as early as March 1, 1998." This is incorrect. On June 1, 1998, LA was awarded the exclusive contract to provide anesthesia services at SEMC. LA still held the exclusive contract at SEMC and continued to provide anesthesia

services at SEMC in direct competition with AA until June 1, 2001. Kochert voluntarily abandoned her anesthesia practice when she opened her pain management practice on a full time basis in August, 2000. Resp. App. at 26-27, 30-31.

Kochert asserts at page 8 that she was "ready, willing and able to continue practicing anesthesiology full time at GLHS, as late as 2002-2003." This, of course, would have been impossible, as Kochert had already opened her own pain management practice and was practicing pain management on a full time basis. Resp. App. at 26-27, 30-31.

Kochert asserts at page 22 that Seaman "established a spectrum of anticompetitive behavior commencing in 1998 and culminating in 2001." Neither Kochert nor Seaman contended that there was any anticompetitive behavior which established any antitrust injury in 1998 when Kochert's subcontract with AA was not renewed. Indeed, Kochert conceded in her Memorandum in Opposition to Defendants' Rule 12 Motions to Dismiss that she did not have any antitrust injury in 1998. Pet. App. at 23.

> Because two separate hospitals had anesthesiology practices, there was not an anti-competitive effect to the market as the result of Dr. Kochert alone being barred from practicing only at Lafayette Home Hospital. Had she brought an antitrust injury at that time, she would have legitimately faced a challenge for not alleging 'an antitrust injury' for standing purposes; her injury would have been limited to only her, as in many of the cases cited by Defendants. Even after Lafayette Home Hospital and St. Elizabeth merged, Dr. Kochert was not precluded from half the market – she and other members of LA could still practice at St. Elizabeth's.

Resp. App. at 39-40. Seaman acknowledged that Kochert did not sustain any antitrust injury from the nonrenewal of her subcontract with AA in 1998. Resp. App. at 35. Seaman also conceded that the consolidation of the OB unit at SEMC with the OB unit at HH did not constitute an antitrust violation. Resp. App. at 34-35.

Kochert further asserts at page 22 that Respondents' "exclusive dealing arrangement excluded Petitioner as a direct competitor and entailed the use of Respondents' market power." This is incorrect. The nonrenewal of Kochert's subcontract by AA on March 1, 1998, did not exclude Kochert as a direct competitor. Kochert and the other LA doctors continued to compete with AA at SEMC when they were awarded the exclusive contract for anesthesia services at SEMC on June 1, 1998. Resp. App. at 13. The nonrenewal of LA's exclusive contract at SEMC in 2001 did not exclude LA from continuing to compete with AA in the geographic market which Seaman defined to include the counties surrounding Tippecanoe County because the LA doctors continued to provide anesthesia services to patients at these hospitals. Resp. App. at 12-13. By the time GLHS elected not to renew LA's exclusive contract at SEMC, however, Kochert was no longer a competitor in the field of anesthesiology because she was doing pain management on a full time basis at her own medical facility. Resp. App. at 26-27, 30-31.

Kochert asserts at page 24 that even if she left the market before 2001, she would still have standing "since Seaman's admitted testimony, combined with that offered by Minore, Gertler and Ivankovich, found adverse competitive effects as early as 1998." As previously discussed, Seaman conceded that the nonrenewal of Kochert's subcontract in 1998 and the consolidation of SEMC and HH

OB units did not, themselves, cause any major anticompetitive concern. Resp. App. at 34-35. Minore and Ivankovich's opinions were limited to expressing opinions regarding the quality of care. Minore admitted that he knew nothing regarding the quality of care at SEMC. Resp. App. at 32-33. Neither Minore nor Ivankovich expressed any opinion that there had been any change in the quality of care. Pet. App. at 110-116, 125-127.

Kochert asserts at page 25 that Gertler testified there was a price increase of 26%. Gertler did not offer any opinions regarding the specific facts of this case as he admitted that he had no knowledge of the facts of this case. Resp. App. at 16-17. The specific facts showed that the rates AA and LA charged for anesthesia services remained competitive with each other.

GLHS and John Walling further object to the misstatements of fact and additional argument contained in the Petitioner's Appendix beginning at page 132. Not only does the Petitioner improperly extend her allowable page limitations by continuing her argument in her appendix, the purported showings of fact are not supported in the record. The rules of this Court do not contemplate that additional contentions may be made in the appendix. *See* SUP. CT. R. 14.2.

REASONS FOR DENYING THE PETITION

A. The District Court and the Seventh Circuit Court of Appeals Properly Applied the Standards Under Rule 56 and This Court's Prior Opinions.

Kochert's entire argument is predicated upon her contention that once the district court overruled the Defendants' *Daubert* challenges to the admission of the testimony of Kochert's expert witnesses, the district court and the Seventh Circuit erred in weighing the sufficiency of their testimony in granting and then affirming the Defendants' motions for summary judgment. Kochert presents in section A of her Petition (pages 11-20) an academic discussion of the relationship between admissibility and sufficiency of evidence. The fallacy of this argument is that it simply has no relevance to the decisions reached by either the district court or the Seventh Circuit.

Kochert asserts in her brief that the district court "weighed the evidence and concluded that it was not 'ultimately persuasive.'" In fact, neither the district court nor the Seventh Circuit "weighed" the evidence. The words "ultimately persuasive" quoted from the district court appear in the court's Memorandum and Order dated November 15, 2004 denying Defendants' *Daubert* motions ("*Daubert* Order"). Pet. App. at 35. The court did not weigh the evidence and conclude that the testimony of Kochert's experts was not persuasive as Kochert's Petition suggests. To the contrary, what the district court actually stated in its *Daubert* Order was, "It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive." Pet. App. at 35. Likewise, in the Memorandum and Order dated

December 29, 2004 granting the Defendants' motions for summary judgment ("Summary Judgment Order"), the district court did not weigh the evidence and conclude that the testimony of Kochert's expert was not "persuasive." The word "persuasive" appears only once in the Summary Judgment Order, in reference to the prior *Daubert* Order: "Though the Court expressed judgments on the reliability and methodology of expert witness testimony, ***it did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact***." (Emphasis supplied). Pet. App. at 19. The district court merely recognized that the evidence may not be persuasive in the end (*i.e.* to a jury if the case proceeded to trial), or sufficient to create a genuine issue of material fact for purposes of summary judgment.

The fact that the district court found the testimony of Kochert's expert witnesses to be admissible did not equate to a finding that there would be genuine issues of material fact. The thrust of Kochert's argument to this Court surrounds the differing standards between admissibility of expert testimony under FED. R. EVID. 702 and *Daubert* and the required burden of production under FED. R. CIV. P. 56 motions for summary judgment. Kochert then proceeds to meld these two standards herself by making assertions such as "[w]hen expert testimony is deemed admissible . . . it is invariably enough to create a dispute about a material fact." Petition at 14. Such a sweeping overstatement betrays Kochert's own misunderstanding of the production requirements under Rule 56. There is, of course, no requirement that all evidence be "expert" to create a genuine issue of material fact. Nor is there any requirement that once expert evidence is deemed admissible, that

it will carry the day on summary judgment. Kochert's own citation to this Court establishes this point.

> We could no more reliably reach conclusions on sufficiency through invocation of Daubert's factors than reach admissibility decisions through evaluation of the nonmovant's total burden of production. ***This is not to suggest that if a party's motion to exclude expert testimony is denied, it will later be foreclosed from asserting a motion for summary judgment.*** Quite to the contrary, it preserves the clarity that accompanies proper sequencing of the motions and makes it more likely that the court will approach the evidence as a whole at the summary judgment stage with a greater appreciation for the role and significance of the expert's testimony.

Andrew I. Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 702 (1997) (emphasis supplied). This distinction was precisely what the district court recognized in this case. The district court correctly discerned the different standards and proper sequencing of its rulings, and summary judgment was properly granted without any weighing of the evidence.

Nothing in the cases cited by Kochert alter this conclusion. In fact, Kochert now acknowledges that there are at least four cases where the outcome was precisely the same.[2] *See Barnes v. Kerr Corp.*, 418 F.3d 583 (6th Cir.

[2] In her initial argument to the Seventh Circuit, Kochert suggested that there were no cases where this event had occurred. Resp. App. at 45. The four cases now cited by Kochert were presented to the Seventh

(Continued on following page)

2005); *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459 (8th Cir. 2004); *Bailey v. Allgas, Inc.*, 284 F.3d 1237 (11th Cir. 2002); and *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998). Although Kochert attempts to distinguish these cases in a footnote, they all support the district court's ruling in this case. Even with admitted expert testimony, the district court must evaluate all of the evidence in the record to determine whether there is a genuine issue of material fact. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Like each of the plaintiffs in these four cases, Kochert simply failed to establish a genuine issue of material fact, even with the admission of expert testimony. "An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect." *Rebel Oil*, 146 F.3d at 1097. Further, "[t]he test [for the admission of expert testimony] under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology," *Id.* (quoting *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)).

The issue for summary judgment is not whether some facts are in dispute. There is no "weighing" of the evidence if the court determines that the evidence as a whole is not sufficient to go to the jury. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or it is not significantly probative . . . summary judgment may be granted." *Id.* at 249-250.

Circuit by the defendants, and, as is the case here, Kochert was then forced to attempt to distinguish them.

Moreover, the district court must review, not only the evidence favorable to the nonmovant, but also the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves*, 530 U.S. at 151 (reviewing FED. R. CIV. P. 50(a) motion) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, p. 300 (2d ed. 1995)). The *Daubert* decision itself recognizes that conventional devices, including judgment as a matter of law and summary judgment, remain appropriate safeguards "where the basis of scientific testimony meets the standards of Rule 702" but the evidence is nevertheless insufficient to allow the case to proceed to the jury. *Daubert*, 509 U.S. at 596.

The decisions of the district court and the Seventh Circuit were properly decided under these standards. In the face of undisputed evidence about Kochert's anesthesiology practice and lack of antitrust injury and standing, the Seventh Circuit did not weigh the evidence or confuse the standards between admissibility and the evidentiary requirements for summary judgment.

The decision of the Seventh Circuit is also not in "conflict" with other circuits, as Kochert suggests in her Petition.[3] Likewise, Kochert's attempts to show a "conflict

[3] In particular, Kochert cites *Maiorana v. U.S. Mineral Products, Co. (In re Joint Eastern & Southern Dist. Asbestos Litig.)*, 52 F.3d 1124 (2nd Cir. 1995) as being in "direct conflict" with the opinion of the Seventh Circuit here. This assertion is incorrect. *Maiorana* is factually and procedurally dissimilar from the case at hand. The case involved an alleged workplace exposure to asbestos allegedly causing colon cancer. The expert testimony at issue was causation testimony based upon epidemiological studies. The Second Circuit held that the district court

(Continued on following page)

in the circuits" by reference to course materials from a recent ALI-ABA conference in San Francisco (Petition at 4) which included submission of a portion of the Manual for Complex Litigation, is unavailing and untrue to the actual discussion referenced.[4] In the referenced section, the author discusses the "conflict in the circuits on the proper interpretation of *Daubert*'s second prong" related to the relevance or "fit" of expert scientific evidence to the specific case. In the present case, the district court did not confuse the relevance of the scientific evidence to the case at hand. Indeed, the court ruled that the testimony was admissible. The quoted "conflict" has nothing to do with the decisions of the district court or the Seventh Circuit.

Although Kochert's arguments regarding the intersection of Rule 702 (including apparently *Daubert*) and Rule 56 undoubtedly make for interesting scholarly discussion, the facts and rulings in this case do not present the issue.[5] Kochert was unable to submit evidence sufficient to carry

---

improperly judged the credibility of the witnesses (" . . . the district court's analysis . . . was rife with independent assessments of witnesses' conclusions and comparative credibilities. . . ."). 52 F.3d at 1133. In the instant case, because neither court weighed the evidence or invaded the province of the jury, there is in fact no "direct conflict" with this case.

[4] See, Opinion and Expert Testimony in Federal and State Courts, ALI-ABA Course of Study Materials, MANUAL FOR COMPLEX LITIGATION, (4th ed.) § 23.25, pp. 202-203 (2006).

[5] Although Kochert attempts to obtain certiorari review on the coattails of this Court's decision to grant such review in the case of *Bell Atlantic v. Twombly*, 126 S.Ct. 2965, *cert. granted* (6-26-2006), there is simply no correlation between that case and the instant case. *Bell Atlantic* involves an issue of whether antitrust cases require heightened pleading standards beyond the traditional "notice pleading" requirements of FED. R. CIV. P. 8 for purposes of surviving a motion to dismiss. That is not an issue here, and except for the fact that both cases are antitrust cases, there is no similarity.

her burden of production under Rule 56 due to the undisputed facts before the courts. None of the experts testified that Kochert was practicing anesthesiology in 2001 because it is undisputed that she was not. None of Kochert's experts testified that she was eliminated from competition in anesthesiology in 1998 because she was not. Thus, this case presents no compelling basis for review of the issues Kochert identifies, and Kochert's Petition should be denied.

B. Kochert Waived the Second Question Presented in Her Petition by First Failing to Advance the Issue in the Seventh Circuit.

Kochert, for the first time in her Petition, introduces an issue regarding the alleged obligation of the district court and the court of appeals to "give reasons - which cannot include weighing the testimony - why admissible expert evidence that reaches all material facts necessary to establish a claim for relief under applicable law is not sufficient to avoid summary judgment." [Petition at i]. The issue was not a part of any of the briefs or arguments made by Kochert to the Seventh Circuit. Resp. App. at 41-47. Because Kochert did not present this issue to the Seventh Circuit for consideration, the issue is now waived. This Court has typically declined to consider issues which were "not pressed or passed upon below." *Duignan v. U.S.*, 274 U.S. 195, 200 (1927); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998), *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987). The reason for such restraint is that "[t]he Court decides which

questions to consider through well-established procedures; allowing the able counsel who argue before [it] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985), the Respondent failed to allege a nonjurisdictional defect in her response to the Petition for Certiorari review and the Court concluded that the defect had also not been raised in the court of appeals. Holding that the issue was waived, Justice Rehnquist stated for the Court: "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." *Id.* Given the scarce resources of the Court, certiorari review of an issue that has been waived is not appropriate, and Kochert's request for such review should be declined.

C. There Is No Obligation on Lower Courts to Offer Explanations of Reasons Why Certain Evidence Is Insufficient to Create a Genuine Issue of Material Fact.

Even if the issue had not been waived, it has no merit and thus does not meet the standards for review by this Court. Kochert's statement of this issue contains an erroneous and unsupported conclusion that her expert testimony "reaches all material facts" (Petition at p. 11), thus somehow obligating the lower courts to offer an additional explanation. As has been shown, the expert opinions do not reach all material facts. Additional findings were therefore unwarranted by the legal issues or the facts of this case. Both courts provided clear and detailed

explanations of the reasons supporting their decisions and why the undisputed facts did not create any genuine issue of material fact. Kochert has offered no convincing reason why federal courts should be required to address issues or facts that are not significant to the basis for their decisions. Indeed, as this Court has previously observed:

> In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other material facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). Thus, there is no obligation for a court to address a fact which becomes immaterial when a party with the burden of proof fails to establish that there is a genuine issue of material fact on an essential element of her case. This Court has further expressly stated that "[t]here is no requirement that the trial judge make findings of fact." *Anderson*, 477 U.S. at 250. This is consistent with FED. R. CIV. P. 52(a) which states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56. . . ." Nor do the cases cited by Kochert support any additional requirements with respect to rulings on motions for summary judgment. *See Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (addressing a *Daubert* ruling, not a ruling on summary judgment); *Wildbur v. Arco Chem. Co.*, 974 F.2d

631, 644 (5th Cir. 1992) (specifically rejecting plaintiff's argument that district court's failure to list or refer to each factual and legal argument means court did not consider these facts or arguments).

Moreover, both the district court and the Seventh Circuit provided extensive explanations of the reasons for their decisions. The district court's Summary Judgment Order addresses all counts of Kochert's complaint and provides a thorough explanation of the basis for the court's ruling. The Seventh Circuit likewise issued an extensive opinion explaining in detail the basis for affirming the district court. It is difficult to conceive what more should be required. Although this issue has been waived for failure to first present the issue to the Seventh Circuit, Kochert's arguments on this issue are without merit. In either event, certiorari review is not justified.

D. Kochert Failed to Establish any Genuine Issue of Material Fact on the Issues of Antitrust Injury and Antitrust Standing.

Both the district court and the Seventh Circuit ruled that the undisputed evidence established that Kochert did not sustain any antitrust injury. In considering the issue, the Seventh Circuit observed that the threshold question was whether Kochert had suffered an antitrust injury. In order to support her claim of an antitrust injury, Kochert was required to demonstrate that her "claimed injuries are 'of the type the antitrust laws were intended to prevent' and 'reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.'" *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)).

The Seventh Circuit recognized that Kochert's antitrust injury theory was based upon her contention that there was a continuum of anticompetitive events beginning in 1998. After distinguishing the cases relied upon by Kochert in support of her continuum theory, the Seventh Circuit held that there was no evidence, including the testimony of Kochert's expert, Seaman, to support her contention that any of the actions taken by GLHS prior to 2001 had any anticompetitive effects, or could support any claim for an antitrust injury. Pet. App. at 11-12; Pet. App. at 14.

Given the total absence of evidence to establish any antitrust injury prior to 2001, the Seventh Circuit then considered the record to determine whether Kochert had sustained any antitrust injury when GLHS awarded the exclusive contract at SEMC to AA effective June 1, 2001. In order to establish an antitrust injury, it was necessary for Kochert to show that the termination of the exclusive contract between SEMC and LA in 2001 was the cause in fact of Kochert's injuries. The Seventh Circuit recognized that this event did not cause her any injury because her anesthesiology practice was "nonexistent by this point." Pet. App. at 14-15. Thus, the Seventh Circuit did not weigh the testimony of Seaman or any of Kochert's other experts in holding that Kochert failed to establish any antitrust injury.

In addition to finding that Kochert failed to sustain any antitrust injury, the Seventh Circuit also upheld the findings and conclusions of the district court that Kochert lacked antitrust standing as a matter of law. Once again,

the decisions of the courts below that Kochert failed to establish antitrust standing were based upon the undisputed evidence. The Seventh Circuit observed that the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest diminishes the justification for allowing a more remote party to sue for antitrust. Pet. App. at 15-16. There was no dispute that the LA doctors had a much more direct interest which would motivate them to protect the public interest than did Kochert. In 2001, the LA doctors, unlike Kochert, were still practicing anesthesiology. *Id.* Furthermore, consumers or insurers would also be more efficient claimants if AA and GLHS were truly manipulating the market in order to raise prices and drive down the quality of care. The fact that Kochert was no longer practicing anesthesiology demonstrated that the causal connection between her injury and the antitrust violation was "tenuous at best." Pet. App. at 16. Thus, as with the issue of antitrust injury, the Seventh Circuit based its decision regarding antitrust standing on the evidence which was undisputed.

E. Kochert Also Failed to Establish any Genuine Issue of Material Fact on Her Remaining Antitrust Claims.

Because of its holding that Kochert failed to establish either antitrust injury or antitrust standing, the Seventh Circuit noted that it was "ultimately unnecessary" to consider whether there was any credible evidence of the type of anticompetitive effects alleged by Kochert. Pet. App. at 17. It therefore was not necessary for the court of appeals to even consider, let alone weigh, the testimony of Gertler whether there had been any anticompetitive

increase in price, or the testimony of Minore and Ivankovich whether there had been any anticompetitive actions which had decreased the quality of care. Their testimony simply was not at all material to the decision of the Seventh Circuit. Despite recognizing that it was not necessary to consider these issues or this testimony, the Seventh Circuit nonetheless observed that "the record is bereft of any credible evidence of the type of anticompetitive effects alleged by Kochert." *Id.*

The undisputed evidence established that there was no increase in any of the prices charged for anesthesia services. Pet. App. at 17. It likewise was unnecessary for the district court or the Seventh Circuit to weigh the testimony of Gertler regarding whether the actions of GLHS had caused any anticompetitive increase in price. Gertler admitted that he had no knowledge of the facts of this case. Resp. App. at 16-18. He admitted he did not know if the hospitals even had an exclusive contract, or what kind of contract they had or what happened to prices. Resp. App. at 18-19. His opinions were based entirely upon a paper which he had authored. Resp. App. at 15-16.

Kochert contends that she established antitrust injuries as early as 1998 because there had been a decrease in the quality of care based upon the testimony of her experts, Minore and Ivankovich. Neither the testimony of Minore nor Ivankovich established any decrease in the quality of care as a result of any exercise in market power. The Seventh Circuit recognized this failure. Pet. App. at 17. Further, Seaman conceded that there was no testimony or evidence that the quality of care had decreased after March 1, 1998. Resp. App. at 36-37. Without comparative information, evidence which is critical of the

quality of care is insufficient to establish an antitrust violation as a matter of law. *Flegel v. Christian Hosp.*, 4 F.3d 682, 688-689 (8th Cir. 1993); *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 707 (D. Minn. 1998), *aff'd*, 28 F.3d 655 (8th Cir. 2000).

Kochert's only expert who offered any opinion regarding the scope of the geographic market was Seaman. The proper geographic market is "that geographic area 'to which consumers can practically turn for alternative sources of their product and in which the antitrust defendants face competition.'" *Fed. Trade Comm'n v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). A determination of the proper geographic market must be based on the "commercial realities of the industry," *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336 (1962), and therefore, must involve a dynamic analysis of where consumers could practically go, not where they actually go. *Freeman Hospital*, 69 F.3d at 268-272.

The district court explained that Seaman's opinions regarding geographic market failed to create a genuine issue of material fact for two reasons. First, Seaman's own data failed to establish a geographic market using the E-H test. Seaman based his analysis on the Elzinga-Hogerty test (the E-H test) which calculates a Lifo, a percentage of patients who come from within the geographic area who go to GLHS, as well as the Lofi, the percentage of patients from outside the geographic area who go to GLHS. Pet. App. at 28. The district court found that Seaman's definition of the geographic market was too narrow. In doing so, the district court did not weigh Seaman's testimony. To the contrary, the district court simply found that Seaman's own data failed to support his conclusions. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or other facts contradict or render the

opinion unreasonable, it cannot support a jury's verdict. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Second, the district court held that Seaman's analysis of the geographic market ignores the commercial realities of the Lafayette, Indiana area. Pet. App. at 30.

Seaman admitted that he did not do any investigation or analysis to determine the quality of the physicians, staff, equipment or facilities at the hospitals in the counties surrounding Lafayette. Resp. App. at 37-38. Seaman's own data shows that a significant number of patients living within Seaman's proposed eight county area travel to other hospitals outside the area as almost 24% of the persons living in Tippecanoe, Montgomery, and Clinton Counties already go to hospitals in Marion County for hospital services. Pet. App. at 30-31. In addition, the hospitals in Marion County are very competitive with GLHS. St. Vincent Hospital and Methodist Hospital in Indianapolis are larger than GLHS and have a well trained staff. These hospitals in Indianapolis compete with GLHS for the more complex procedures. Resp. App. at 49.

Thus, contrary to Kochert's protestations, the evidence in this case was simply insufficient to create any genuine issue of material fact on Kochert's antitrust claims, and the decisions of the lower courts were based upon sound considerations and without any weighing of the evidence. The Petition should therefore be denied.

CONCLUSION

An analysis of each of the issues decided by the district court and the Seventh Circuit shows that neither court weighed the opinions or testimony of Kochert's experts in

reaching their decisions that the Respondents were entitled to summary judgment. To the contrary, both courts determined that, notwithstanding the admissibility of this evidence, the testimony and opinions of Kochert's experts failed to create any genuine issue of material fact. The district court correctly recognized the distinction been the admissibility of the expert testimony and the evidentiary burdens of the parties in considering and granting summary judgment. Kochert confuses the standards by erroneously suggesting the mere admission of expert testimony should have equated to a finding of a genuine issue of material fact. Both courts carefully explained their reasons why the undisputed evidence demonstrated there were no genuine issues of material fact, and Kochert waived any claims to the contrary by failing to present them to the Seventh Circuit. Therefore, this case does not present any novel issue or analysis of Rule 56 of the Federal Rules of Civil Procedure or Rule 702 of the Federal Rules of Evidence. Accordingly, and for all of the reasons stated above, GLHS and Walling respectfully request that Kochert's Petition for Writ of Certiorari be denied.

Respectfully submitted,

LARRY R. FISHER
Counsel of Record
STUART & BRANIGIN LLP
300 Main Street, Suite 900
P.O. Box 1010
Lafayette, IN 47902-1010
Telephone: 765-423-1561
Facsimile: 765-742-8175

Counsel for the Respondents, Greater Lafayette Health Services, Inc. and John Walling

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAROLYN KOCHERT, M.D., Plaintiff, v. LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., and KENNETH J. BOCHENEK, M.D., Defendants.	)	CAUSE NO. 4:98 CV 0053 AS

DEPOSITION OF KENNETH J. BOCHENEK, M.D.

The deposition upon oral examination of KENNETH J. BOCHENEK, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at the Law Offices of Stuart & Branigin, 300 Main Street, Suite 800, Lafayette, Tippecanoe County, Indiana, on the 8th day of April, 1999, pursuant to the Indiana Rules of Trial Procedure with written notice as to the time and place thereof.

* * *

[206] Q. What is the date of the meeting for which these minutes were created?

A. December 3, 1997, 6:00 p.m.

Q. Is this the meeting that you earlier referred to that's the one in which you discussed the possibility of not renewing the contract?

A. Yes, I believe it is.

Q. Was there discussion at this meeting about not renewing Dr. Kochert's contract?

* * *

[207] Q. Do you recall what anyone else said during this meeting?

A. A month and a half ago. It was the conclusion as is written in the minutes here that an extension would not be offered to Dr. Kochert. What each individual said at that meeting. I'm sorry I do not know.

* * *

[208] Q. Did you determine her work performance was sub-par?

WITNESS: Did I or did the corporation?

[209] MR. FOSTER: Either one. I'll take any answer at this point.

A. My personal feelings were that it was unacceptable.

Q. Could you tell me why?

A. Dr. Kochert is rude to patients. She's abrasive and abrupt with physicians. She is rude to hospital administration, and she is abrasive, condescending and rude to hospital staff members.

Q. Is that all the reasons in your mind?

A. In my mind that's enough.

* * *

[211] Q. No. Is there anything else sufficient or more than sufficient?

A. Yes. Her repeated attempts to undermine the success of the contract.

Q. Could you please be specific?

A. Be specific? Her repeated attempts at leaving an assigned area at Home Hospital to go to St. Elizabeth's Hospital to perform procedures. The documented attempt and performance of abandoning a call position at Home Hospital which is in direct conflict with her independent contractor's contract which forbid her doing so. Her actions intimidating patients to the point that they feared for their lives. That's a quote.

* * *

[212] Q. – So far you have talked about repeated attempts to undermine, repeated leaving of areas to go to St. Elizabeth's, abandoning an on call position.

A. Further undermining the morale of the corporate members and independent contractor members by substituting a false vacation book in the surgical staffing office of Home Hospital. And is there a reason that you are limiting it at the December date?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

The continuing deposition upon oral examination of KENNETH BOCHENEK, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the plaintiff, at the law offices of Stuart and Branigin, 300 Main Street, Suite 900, Lafayette, Indiana, on the 4th day of November, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

DEP. EXHIBIT 146

COMMERCIAL INSURANCE	
9/1/94 – 2/1/97	$41.00
21/1/97 – 1/22/99	$43.00
1/22/99 – 3/6/00	$48.00
3/6/00 –	$53.00

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

vs.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

DEPOSITION OF BARBARA CONARD, M. D.

The deposition upon oral examination of BARBARA CONARD, M. D., a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Law Offices of Stuart & Branigin, 300 Main Street, Lafayette, Indiana, on the 8th day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[103] Q. Can you identify this document?

A. Okay, Articles of Organization of Lafayette
[104] **Anesthesiologists LLC.**

MR. ZAREMSKI: Is it 108? What was the one that were were just –

MS. WOODS: 108 –

MR. ZAREMSKI: – that we were just –

MS. WOODS: 107.

MR. ZAREMSKI: 107.

A. Deposition 108 – Articles of Organization of Lafayette Anesthesiologists LLC.

Q. Doctor, I'd like you to just look at the second page of this document. Do you recognize Dr. Farrell's signature on that?

A. Yeah.

Q. And this document indicates that the Articles of the Organization were executed on March 16, 1995, correct? On the second page, doctor –

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CASE NO. 4:01CV0027AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

vs.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

DEPOSITION OF CAROLYN KOCHERT

The deposition upon oral examination of CAROLYN KOCHERT, a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Law Offices of Stuart & Branigin, 300 Main Street, Lafayette, Indiana, on the 4th day of September, 2002, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[15] Q. Okay. When was Advanced Pain Management formed?

A. Around August of '99, but we actually had a name before we actually did all the paperwork for it. So, I'm not sure exactly when we did all the paperwork –

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV23AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

The continuing deposition upon oral examination of JOSEPH FARRELL, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the plaintiff, at the Unity Medical Center, 1411 South Creasy Lane, Lafayette, Indiana, on the 20th day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[40] Q. What was the rate that your group was charging before it raised to $55 per unit?

A. I believe it was $52 per unit.

Q. When did the rate of $52 per unit go into [41] effect?

A. 2001.

Q. Do you recall when in 2001 that rate went into effect?

A. I believe in the fall. I don't recall specifically.

* * *

[43] Q. Prior to increasing your group's rate to $52 per unit in the fall of 2001, what was your group's rate?

A. $48 per unit.

Q. Do you recall when your group raised its rates to $48 per unit?

A. Would have been just prior to June of '98. At [44] that time, I'm not even sure we raised it at that time. But that's what it was going into the contract with St. Elizabeth Hospital.

Q. I think your contract is one of the exhibits. Perhaps to refresh your recollection, I believe that when your group entered into the exclusive contract with St. Elizabeth, the contract provided that as of June 1, 1998 your group's per unit charge was $43; does that sound correct?

A. Okay, that could well be.

Q. And it was sometime after that that your group increased its rate to $48 per unit; do you recall that? While the contract was still in effect.

A. If it was $43 to start with, it seems that sometime during that period we did increase it to $48.

* * *

[47] Q. Now I understand that your group has a contract at this time with St. Clare Hospital; is that correct?

A. Yes.

Q. And essentially what are the services that you are expected and required to provide to St. Clare under your contract at St. Clare?

A. Coverage of the anesthesia needs of the hospital in the operating room and the obstetrical suite and elsewhere it's required.

Q. So this would be coverage of outpatient surgical anesthesia, inpatient surgical anesthesia, and OB anesthesia, correct?

A. Yes.

[48] Q. How many days a week is your group expected to provide that level of service?

A. Usually six out of seven.

* * *

[49] Q. Are you currently providing anesthesia services at St. Vincent Hospital in Frankfort?

A. Yes.

* * *

[50] Q. And the same doctor who provides surgery for outpatient anesthesia would also be qualified to provide services for inpatient or OB services at St. Vincent in Frankfort, correct?

A. Yes.

Q. Other than yourself, are there any other doctors from LA who are also providing anesthesia services at St. Vincent's in Frankfort?

A. Dr. Lempke and Dr. Gray.

* * *

[69] Q. When did you begin doing work at Logansport?

A. In I believe February of 2002, late February.

Q. Which of the doctors from LA worked at Logansport?

A. All of us.

Q. Did your group have a contract with Logansport?

A. Yes.

* * *

[89] Q. When Lafayette Anesthesiologists got the exclusive contract in June of 1998, I understand there were five anesthesiologists who were members of your group; is that correct?

A. Yes.

* * *

[117] Q. After Dr. Kochert went into pain management [118] on a full time basis did you regard Dr. Kochert as a competitor of LA?

MR. FOSTER: Object to the extent it asks the witness for a legal conclusion. Go ahead.

A. Probably not.

Q. And would that be because for all intents and purposes she was no longer in the business of providing anesthesia services for patients?

A. She was providing pain management services. It's a specialty area of anesthesia services and she was not providing OR services. So in that sense she wasn't a competitor.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION OF LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D., Defendants.	)	No. 4:01CV0027AS

DEPOSITION OF PAUL J. GERTLER, PH.D.
Berkeley, California
Friday, February 6, 2004

Reported by:
JODI L. BOSETTI, RPR
CSR No. 11316
JOB No. 49390

* * *

[10] Q Okay. Well, what were you asked to do in this case, Doctor?

A I was asked to comment on my research.

Q Okay. And what research is that?

A It's the paper, "Strategic Integration of Hospitals and Physicians."

Q And were you asked only to comment on that paper or your research in general?

A Only on that paper.

Q Tell me how that paper came to be written?

* * *

[44] Q So am I correct, an individual practice association is some type of entity that is formed between physicians and hospitals in order to hold managed care contracts?

A Individual practice associations are a form of physician groups. And when they also include hospitals in them, their primary purpose is to deal with joint contracting with managed care organizations.

Q Do you know if there are any such groups at issue in this case?

A I do not know.

Q And so, of course, if there are not, anything that you say about these IPAs would not be relevant to this case, correct?

MR. ZAREMSKI: Objection. That's not what the doctor is saying, nor the fact about not seeing an exclusive contract. So please don't put words in the doctor's mouth.

Subject to that objection, you can answer if you can, Doctor.

THE WITNESS: Now, could you –

MS. WOODS: I'm going to move to strike the speaking objection, and if you do it again we'll call [45] the judge.

MR. ZAREMSKI: If you can appropriately ask questions and not put words in the witness's mouth then we will all be better off. So let's proceed.

BY MS. WOODS:

Q Answer the question, please, Doctor?

A Can you repeat it again, please.

Q She'll read it back.

(Record read.)

MR. ZAREMSKI: Continuing objection.

THE WITNESS: Well, I don't know anything about this case. I don't know the facts of the case.

* * *

[60] Q Do you have any –

A I should preempt, I've answered the question that I have no information about this case and none has been provided to me. So any questions you might ask about relating specifically to these contracts or this hospital I can't answer.

Q Okay.

A So that might save us some time. But if you want to ask it, then you can.

Q I want to make sure that we've made the record on this then. So you are basically saying that you've written

this paper, but you have no opinion as to how this paper relates to the particular facts of this case; is that correct?

MR. ZAREMSKI: Objection. That's not what he's testified to.

THE WITNESS: I said I don't know the facts of this case. I don't know the particular facts of the specific contract. What I can say is that unless it is a fully integrated organization type, which is such in my paper, it is not my belief that any relationship could lead to efficiency or quality improvements unless it is that contract.

* * *

[103] Q Okay. But in any particular instance – and if we can find ourselves for purposes of this litigation, since this is what this case is about, to the actual prices that are charged in Lafayette, Indiana by the two hospitals there – you're not able to tell us whether those prices are a result of the presence of any particular contracts those hospitals may have with physicians, correct?

MR. ZAREMSKI: Objection.

THE WITNESS: I don't know anything about the Lafayette market.

BY MS. WOODS:

Q Okay.

A I want to be more precise. I don't know the [104] facts of the case. I don't know even if there was a contract.

Q Or what kind of contract is was?

A Correct.

Q Or what happened to prices?

A Correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION OF LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,
Plaintiff,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.,
Defendants.

The deposition upon oral examination of CYNTHIA MEYER, a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at Unity Medical Center, Creasy Lane, Lafayette, Indiana, on the 21st day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[43] Q When did LA go to the standard charge of $55.00 per unit?

A I believe it was March of 2003.

* * *

[52] Q When did you raise your rates to $52.00 per unit?

A That was September 1st of 2001.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M. D.,
Plaintiff,
vs.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P. C., JOHN WALLING, and KENNETH BOCHENEK, M. D.,
Defendants.

DEPOSITION OF CAROLYN KOCHERT

The deposition upon oral examination of CAROLYN KOCHERT, a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Unity Healthcare, 1345 Unity Place, Lafayette, Indiana, on the 19th day of November, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[46] Q Now, when you and Dr. Bigler were talking about opening your practice, and if I'm not mistaken, it was by August 1 that you had formed your practice and left Lafayette [47] Anesthesiologists, correct?

A No.

Q No? What's the date?

A We actually opened our office on August 23rd, '99.

Q Okay.

A And we did pain part-time and anesthesia part-time for at least a year and did not separate from LA until summer of 2000.

* * *

[250] Q Okay. Doctor, did there come a time when you were no longer on the schedule at St. [251] Elizabeth Hospital?

WITNESS: Schedule for elective cases?

MS. WOODS: For – yes, the surgery schedule for the anesthesia schedule?

A Yes.

Q And when was that?

A Probably starting September or August of 2000.

Q Okay. Did you have a discussion with Dr. Farrell, who was preparing the schedules at the time, as to whether you should appear on the August schedule in 2000?

A Actually, I think I was on the – I don't remember which schedule it was, but yes, there was a discussion with Dr. Farrell.

Q Okay. I'm going to show you what's been previously marked, and this exhibit is 136. And those are some schedules that Dr. Farrell produced during his deposition.

I'll direct your attention to the last page, which is the August 2001 schedule. I think you'll see that –

WITNESS: August 2000?

MS. WOODS: Yes.

Q – that your name does not appear on that [252] schedule.

A That's correct.

Q Okay, and Dr. Farrell testified that you were not on the August 2000 schedule or on the schedule on a regular basis after August of 2000.

MR. ZAREMSKI: I'm going to object insofar as Dr. Farrell's testimony speaks for itself.

MS. WOODS: Well, I'm sure it does but we're just trying to establish a context and move this along, Miles.

Q So did you have any reason to believe that you were on the schedule after August of 2000?

A No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV0027AS

CAROLYN G. KOCHERT,
Plaintiff,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.

The continuation of the deposition of CAROLYN G. KOCHERT, a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at the Unity Healthcare, 1345 Creasy Lane, Lafayette, Indiana, on the 1st day of December, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[121] Q Can you identify Exhibit 203, please?

A It's a letter from Women's Hospital in Indianapolis.

Q It's a three-page exhibit.

A Well the first part is a letter from Nan Todd to St. Elizabeth. The second one is application, consent and release, and the third one is clinical privileges for anesthesiology at Women's Hospital in Indianapolis.

Q Is that your signature on the application for privileges?

A Yes, it is.

Q What is the date of the application for privileges?

A 8/18/00.

Q Now does that help refresh your recollection that in fact you did seek privileges at one hospital in Marion County?

A I don't even remember doing this but obviously I did.

Q What was your reason for seeking privileges at Women's Hospital in Indianapolis?

A I don't even know. I don't remember – honest [122] to God, I don't remember this.

Q What privileges were you seeking?

A Anesthesia. That's what it says, anesthesia privileges. But "I do not intend to do surgical anesthesia." I think this must have been for pain management.

* * *

[139] Q So by August 1 of 2000 your pain management practice had advanced to the point where you elected

to open up a pain management practice apart from LA and do that as a full time basis, correct?

A Yes.

* * *

WOMEN'S HOSPITAL OF INDIANAPOLIS
CLINICAL PRIVILEGES
ANESTHESIOLOGY

"In emergency, any member of the Medical Staff to the degree permitted by license and regardless of service or staff status or lack thereof, shall be permitted and assisted to do everything possible to save the life of a patient, using every facility of the Hospital necessary, including calling for any consultation necessary or desirable." (Medical Staff Bylaws, Article VII, Section 3)

I do hereby request the following privileges indicated. I understand that in exercising any clinical privilege granted, I am constrained by relevant Hospital and Medical Staff Policies requiring consultations for difficult diagnoses, conditions of extreme severity, and procedures/conditions which are beyond my area of specialization and expertise, by Hospital policies concerning the types of patients for whom it does not have appropriate resources (facilities, equipment or personnel) to treat except on an emergency basis, and by such special policies as may from time to time be adopted.

____ Spinal anesthesia (Saddle Block) for vaginal delivery

__✓__ Intravenous regional anesthesia (Bier Block)

__✓__ Management of problems in pain relief by regional anesthetic

__✓__ The support of life functions under stress of anesthetic and surgical manipulations

__✓__ The clinical management of the patient unconscious secondary to anesthesia

__✓__ The application of specific methods of respiratory therapy

✓ Plexus anesthesia

✓ Management of problems in pain relief by regional anesthetic

✓ The management of procedures for rendering a patient insensible to pain and emotional stress during surgical, obstetrical and certain medical procedures

✓ The management of problems in pain relief

✓ The management of problems in cardiac and respiratory resuscitation

✓ The clinical management of various fluid, electrolytes and metabolic disturbances during surgery/recovery stage

ADDITIONAL PRIVILEGES.

_____ [I do not intend to do surgical anesthesia]

_____

_____

/s/ Carolyn G. Kochert 8/18/00

PHYSICIAN'S SIGNATURE DATE

APPROVAL:

_____ _____

MEDICAL DIRECTOR OF ANESTHESIA DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D.,	)	
Plaintiff,	)	
vs.	)	
GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., JOHN and WALLING and KENNETH J. BOCHENEK, M.D.,	)	**Civil No. 4:01CV0027AS**
Defendants.	)	

PLAINTIFF'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT, GREATER LAFAYETTE HEALTH SERVICES, INC., et al.

Plaintiff, Carolyn G. Kochert, M.D. ("Kochert"), by and through her attorneys, Miles J. Zaremski ("Zaremski"), Michael B. Brohman and Ron S. Brand of Kamensky & Rubinstein and Randall L. Vonderheide of Vonderheide and Knecht, P.C., and pursuant to the June 4, 2003 order of this Court, hereby responds to Interrogatories propounded by defendant, Greater Lafayette Health Services, Inc. ("GLHS"), as follows.

INTERROGATORIES
PROPOUNDED TO THE PLAINTIFF

* * *

15. Regarding Advance Pain Management (APM), please state:

15g. The date that you devoted your full-time effort to your pain management practice;

ANSWER

15g. August 1, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	CIVIL NO. 4:01CV27AS DEPOSITION OF DR. WILLIAM STEPEHN MINORE 12-19-03

Deposition of DR. WILLIAM STEPHEN MINORE, a witness of lawful age, taken on behalf of the defendants, Anesthesiology Associates, P.C., John Walling and Kenneth Bochenek, M.D., in the above-entitled cause, wherein Carolyn Kochert is the plaintiff and Greater Lafayette Health Services, Inc., et al. are the defendants, pending in the District Court of the United States for the Northern District of Indiana, Northern Division, Hammond Division at Lafayette, before Deb Fisher, notary Public in and for Winnebago County, Illinois, in the offices of Rockford Anesthesiologists Associated, 2202 Harlem Road in the City of Loves Park, State of Illinois, on the 19th day of December, 2003, commencing at 4:30 p.m., as reported and transcribed by Deb Fisher, Certified Shorthand Reporter in and for the State of Illinois.

* * *

[173] Q. Do you have any opinion whether Dr. Bochenek or any member of his group has deviated from the standard of care regarding any care or treatment of patients at St. Elizabeth?

A. I don't believe I've ever made a comment about St. Elizabeth Hospital, nor in my affidavits do I reference St. Elizabeth Hospital, so I guess I'm a little confused. But I'll stipulate I don't know what goes on at St. Elizabeth Hospital unless someone provides me some information to review.

Q. Well, that's just why I want to make sure that we're clear on the record you're not expressing any opinions about whether there had been any deviation from the standard of care regarding [174] any care and treatment of any patients at St. Elizabeth.

MR. ZAREMSKI: I'm going to object insofar as as long as there's no inconsistency with paragraph 8 of the doctor's affidavit.

MR. PENNELL: You may answer.

A. Like I said, I don't think I commented on anything with respect to St. Elizabeth.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAUSE NO. 4:01CV0027AS

CAROLYN G. KOCHERT, M.D.,
Plaintiff,

-vs-

GREATER LaFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LaFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.,
Defendants.
_____/

DEPOSITION OF BRUCE A. SEAMAN, Ph.D.
Tuesday, January 28, 2004
9:03 a.m. – 5:40 p.m.

1325 Virginia Avenue
Atlanta, Georgia

REPORTED BY:
Sharon A. Gabrielli, RPR, CCR
Esquire Deposition Services
Atlanta Office Job #412373
Phone – 404.872.7890

* * *

[19] Q. Do you have any opinion in this case whether the closure of the OB unit at St. E and consolidating that with the OB unit at Home Hospital was an antitrust violation?

A. I would say that the mere closing of the OB unit in and of itself as opposed to issues that are raised more broadly by a series of events, just isolating the OB unit closing in and of itself, that would not typically be an antitrust violation.

* * *

[25] Q. Dr. Seaman, in Dr. Kochert's Memorandum in Opposition for Defendant's Rule 12 Motion to Dismiss, which was filed in this case on December 4, 2001, Dr. Kochert makes the following statement on page 38 of her brief: "Because two separate hospitals had anesthesiology services, there was not an anticompetitive effect to the market as a result of Dr. Kochert alone being barred from practicing only at [26] Lafayette Home Hospital. Had she brought an antitrust suit at that time, she would have legitimately faced a challenge for not alleging an antitrust injury for same purposes. Her injury would have been limited only to her. As in many of the cases cited by the defendants, even after Lafayette Home Hospital and St. Elizabeth's merged, Dr. Kochert was not precluded from half of the market. She and other members of LA could still practice at St. Elizabeth's."

Do you agree with that statement?

MR. ZAREMSKI: I'm going to object. That statement comes out of a pleading in response to a Rule 12(b)(6) proceeding. And it is done for advocacy purposes and in a different context.

THE WITNESS: I have one quick clarifying question, then I'll of course answer it. What was the exact source of that statement again; that was the pleading by Dr. Kochert?

Q. (By Mr. Pennell) It was her Memorandum in Opposition to a Defendant's Motion to Dismiss.

A. Right. I think the substance of that statement is broadly consistent with the answer that I gave a moment ago.

* * *

[81] Q. Are you aware of any testimony or evidence of whether the frequency of Dr. Bochenek's leaving the operating room is more or less after June 1, 2001 than it was before June 1, 2001?

A. I'm not aware of any testimony that specifically addressed that issue of frequency prior to 2001 versus after 2001.

Q. Are you aware of any testimony or evidence [82] as to whether his alleged conduct of frequently or regularly listening to the radio has happened any more or less frequently after June 1, 2001?

Mr. Zaremski: It has been asked and answered.

You can answer.

THE WITNESS: I think it is the same answer. I'm not aware that anyone had even been specifically asked that question.

Q. (By Mr. Pennell) Are you aware of any evidence or testimony as to whether the quality of care provided by Dr. Bochenek is better or worse after June 1, 2001 than it was before that date?

A. I think it would have to be the same answer. I'm not aware of a – I'm not aware of an answer to any deposition question or any affidavit that specifically attempted to

quantify the severity pre-2001 or June 2001 versus post-2001.

Q. Okay. Are you aware of any testimony or evidence that the quality of care provided by AA as a group is better or worse after June 1, 2001 than it was before June 1, 2001?

MR. ZAREMSKI: Asked and answered – I'll withdraw it.

You can answer.

[83] THE WITNESS: I think it's the same answer.

* * *

[276] Q. You've not done any study or factual analysis of the quality of the staff or facilities at these other hospitals, correct?

A. I think quality of staff, generally defined, would be difficult to get data on, absent subpoenas or something of internal records of complaints.

Certainly descriptively, we know how many beds they are. We know, for example – I can tell you this: In Tippecanoe County, using GLHS facilities and 740 beds, there are – there is a bed for every 210 people in Tippecanoe County.

In the surrounding counties, given the size of those facilities, which is some reflection of their adequacy, the number of people per bed or the – there is a bed for every 999 people, I believe, in White County; there is a bed for every 560-odd people, I believe, in Clinton County; and I

believe that figure is about a bed for every 380 or so people in Montgomery County.

Is that an adequate study? No. Does it reflect something about the adequacy of the facilities? Modestly. It deals with number of beds.

Q. All right. Other than the number of beds, [277] you have no facts or information about the quality of facilities at any of these hospitals correct?

A. I would love, dearly love to see such a study done by anyone else in this case and let me look at the data, because I think it's of some use. But I think it has been very difficult to generate such a study.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D., Defendants.	)	4:01CV0027AS

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' RULE 12 MOTIONS TO DISMISS

(Filed Dec. 4, 2001)

Plaintiff, Carolyn G. Kochert, M.D., by her attorneys, Randall L. Vonderheide of Vonderheide & Knecht, P.C., and Miles J. Zaremski of Kamensky & Rubinstein, submit this Memorandum in Opposition To Defendants' Rule 12 Motions to Dismiss.

[38] Because two separate hospitals had anesthesiology practices, there was not an anticompetitive effect to the market as a result of Dr. Kochert alone being barred from practicing only at Lafayette Home Hospital. Had she brought an antitrust suit at that time, she would have legitimately faced a challenge for not alleging an "antitrust injury" for standing purposes; her injury would have been limited to only her, as in many of the cases cited by

Defendants. Even after Lafayette Home Hospital and St. Elizabeth's merged, Dr. Kochert was not precluded from half of the market – she and the other members of LA could still practice at St. Elizabeth's.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc.,
d/b/a Lafayette Home Hospital,
d/b/a St. Elizabeth Medical Center,
John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamensky Rubinstein
Hochman & Delott, LLP
7250 N. Cicero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 3

A. Nature of the Case 3

B. Proceeding Below 5

C. Disposition of the Court Below 5

STATEMENT OF FACTS 6

I. SUMMARY OF ARGUMENT 18

II. ARGUMENT – STANDARDS OF REVIEW 23

III. INTRODUCTION 24

IV. MATERIAL QUESTIONS OF FACT REMAIN FOR A JURY TO DECIDE GIVEN THE OPINIONS OF EXPERT TESTIMONY 26

V. MATERIAL QUESTIONS OF FACT REMAIN AS TO CONTINUUM OF EVENTS/ANTITRUST STANDING, AND ANTITRUST INJURY 33

VI. MATERIAL QUESTIONS OF FACT REMAIN THAT DEFENDANTS RESTRAINED TRADE AND MONOPOLIZED ANESTHESIOLOGY SERVICES 36

A. The Relevant Markets 36

1. Product Market 36

2. Geographic Market 37

a. Hospital Services 37

b. Anesthesia Services 44

3. Market Share, Market Dominance, and Monopoly 45

VII. MATERIAL QUESTIONS OF FACT REMAIN THAT HARM TO COMPETITION HAS OCCURRED 46

A. Consumer Welfare (Quality of Care)..... 46

B. Pricing of Anesthesia Services 48

C. Output (Availability) of Anesthesia Services 50

VIII. MATERIALS QUESTIONS OF FACT REMAIN WHETHER THE EXCLUSIVE CONTRACTS WERE PRO-COMPETITIVE..... 51

IX. MATERIAL EVIDENCE SHOWS UNLAWFUL TYING OF ANESTHESIA SERVICES TO HOSPITAL SERVICES 52

X. MATERIAL QUESTIONS OF FACT REMAIN WHETHER DEFENDANTS CONSPIRED TO MONOPOLIZE 54

XI. MATERIAL QUESTIONS OF FACT REMAIN WHETHER DEFENDANTS CONSPIRED TO BOYCOTT AND RESTRAIN TRADE..... 58

XII. MATERIAL QUESTIONS OF FACT REMAIN WHETHER DEFENDANTS CONSPIRED TO MONOPOLIZE TO DENY CONSUMER ACCESS TO SERVICES IN AN ESSENTIAL FACILITY 63

XIII. MATERIAL QUESTIONS OF FACT REMAIN WHETHER KOCHERT'S DAMAGES ARE DIRECTLY ATTRIBUTABLE TO PRESERVING COMPETITION..... 66

XIV. CONCLUSION 68

ISSUES PRESENTED FOR REVIEW

I. Whether summary judgment is appropriate when:

A. The trial court has upheld under *Daubert* the relevance and validity of expert opinions validating all of plaintiff's material factual contentions.

B. Kochert has produced substantial material evidence that:

1. She has standing and has suffered antitrust injury as a direct consequence of defendants' actions excluding competition, including her competition, from the relevant market.

2. Defendants have market power or monopoly power in the relevant markets for hospital services and anesthesiology service,

3. Defendants used their power in the relevant market to exclude competition in the market for anesthesiology services.

4. Defendants have caused demonstrable harm to consumers of anesthesiology in the relevant market by reducing the quality of services, increasing their price, and decreasing the quantity or availability of these services

5. Defendants failed to produce any irrefutable evidence that the exclusion of competition produced legitimate, pro-competitive effects that unambiguously outweighed the consumer harm arising from Defendants' conduct.

II. Whether summary judgment is appropriate when the plaintiff has produced material evidence in support of plaintiff's alternative theories of antitrust liability that:

A. Defendants engaged in:

1. Unlaw[illegible]ying of access to hospital surgical and obstetric care in the relevant market to the purchase of anesthesiological services.

2. Unlawfully monopolizing the provision of anesthesiological services in the relevant market.

3. Unlawfully conspiring to restrain trade and engage in a boycott of competing suppliers of anesthesiology, including Kochert, in the relevant market.

4. Denying competitive anesthesiology providers access to their monopoly hospital facilities to the detriment of consumers.

III. Whether summary judgment is appropriate when Kochert produced material evidence that her damages were a direct consequence of her exclusion from providing anesthesiology services to consumers desiring those services in the relevant market.

* * *

[29] Although it is difficult to prove a negative, a thorough review of the case law has failed to uncover any cases in which a court found that expert testimony was both [30] relevant and reliable regarding material facts, but that summary judgment was then appropriate.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc.,
d/b/a Lafayette Home Hospital,
d/b/a St. Elizabeth Medical Center,
John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamensky Rubinstein
Hochman & Delott, LLP
7250 N. Cicero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

I. EXPERT TESTIMONY ESTABLISHES MATERIAL QUESTIONS OF FACT 2

II. KOCHERT HAS ANTITRUST STANDING AND HAS SUSTAINED ANTITRUST INJURY 10

III. *ROCKFORD MEMORIAL* SUPPORTS KOCHERT'S GEOGRAPHIC MARKET 15

IV. KOCHERT HAS SHOWN HARM TO COMPETITION 19

A. A Linkage Exists Between Quality of Care and the Exclusive Contracts 19

B. Diminished Output Remains an Issue and Shown into 2004 23

C. Pricing Shows Harm to Competition 24

V. GLHS AND AA FAIL TO ESTABLISH PRO-COMPETITIVE EFFECTS 24

VI. CONSPIRACY TO MONOPOLIZE/*RES JUDICATA* 25

VII. CONCLUSION 26

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D. Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	Civil No. 4:01CV27AS

AFFIDAVIT

Comes now Jeffrey R. Nagy, who being duly sworn upon his oath, deposes and says:

1. I am presently employed by Greater Lafayette Health Services, Inc. (GLHS) as the Executive Vice President and Chief Operating Officer responsible for the operation of St. Elizabeth Medical Center (St. E) and Home Hospital (HH) in Lafayette, Indiana. GLHS is a not-for-profit corporation which was established in 1998 as the owner and operator of St. E and HH as a result of the consolidation of the two hospitals. Prior to the formation of GLHS, St. E and HH were independently owned and operated. Prior to the formation of GLHS, I was the Chief Financial Officer for HH.

* * *

14. There are several hospitals in nearby counties including White, Montgomery, Cass, Clinton, Boone, Jasper and Warren counties which are within an hour drive from Lafayette. These and other hospitals compete for patients who require hospital services. These hospitals compete with GLHS for patients who require outpatient and most of the same inpatient services provided by GLHS. There are a few high risk, more complicated inpatient procedures, such as open heart surgery, which are not performed in these hospitals. In these cases, GLHS must compete with the hospitals in Indianapolis for patients needing these services. St. Vincent's hospitals in Frankfort and Williamsport are affiliated with the St. Vincent's Hospital in Indianapolis. Given this affiliation, referrals of patients to St. Vincent Hospital in Indianapolis would be a common occurrence. St. Vincent's Hospital and Methodist Hospital in Indianapolis are easily accessible to patients living in the Lafayette area. The travel time on I-65 between Lafayette and these Indianapolis hospitals is just about one hour. St. Vincent's Hospital and Methodist Hospital in Indianapolis are each larger than GLHS. They are excellent medical facilities and have highly trained and skilled staffs and physicians.

15. The competition from these and other hospitals act as constraint on any ability of GLHS to engage in any anti-competitive behavior such as raising prices to uncompetitive levels or reducing quality. Almost 50% of GLHS' patients reside outside of Tippecanoe County. GLHS would risk the loss of a significant number of these patients as well as patients living in Tippecanoe County if GLHS were to attempt to engage in such uncompetitive behavior.

* * *

Further affiant saith not.

/s/ Jeffrey R. Nagy
Jeffrey R. Nagy

No. 06-822

FILED
JAN 25 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CAROLYN G. KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILES J. ZAREMSKI
Counsel of Record
KAMENSKY RUBINSTEIN HOCHMAN AND DELOTT, LLP
7250 N. Cicero Avenue, Suite 200
Lincolnwood, Illinois 60712
Telephone: (847) 982-1776
Facsimile: (847) 982-1676

DAVID L. FAIGMAN
200 McAllister Street
San Francisco, California 94102-4978
Telephone: (415) 565-4739
Facsimile: (415) 565-4865

PETER C. CARSTENSEN
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, Wisconsin 53706
Telephone: (608) 263-7416
Facsimile: (608) 262-5485

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
Telephone: (202) 944-2874
Facsimile: (202) 965-0920

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN SUPPORT OF THE PETITION 1

A. Kochert Satisfied Antitrust Standing, Antitrust Injury and Harm To Competition 1

B. Lower Federal Courts Have Increasingly Confused Admissibility and Sufficiency 4

C. Kochert Has Not Waived any "Question Presented" 8

D. Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Allison v. McGhan Med. Corp., 184 F.3d 1300 (11th Cir. 1999) 5

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) 8

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Frye v. United States, 293 F. 1013 (1923) 7

Gruca v. Alpha Therapeutic Corp., 51 F.3d 638 (7th Cir. 1995) 6

Hall v. Baxter Healthcare Corp., 947 F.Supp. 1387 (D. Or. 1996) 5

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977) 3

In re Joint Eastern & Southern Dist. Litig. v. U.S. Mineral Products Co., 52 F.3d 1124 (2d Cir. 1995) 6

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 3

Weisgram v. Marley Co., 528 U.S. 440 (2000) 7

Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993) 7

RULES

Fed. R. Civ. P. 56 8

Fed. R. Civ. P. 56(c) 8, 10

Fed. Rule of Evid. 702 ..... 7, 8, 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 Law & Contemp. Probs. 289 (2001) 5

Cheng & Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471 (2005) 7

Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 Antitrust L.J. 663 (1997) 4

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000) 5

Rothstein, *Opinion and Expert Testimony in Federal and State Courts*, MANUAL FOR COMPLEX LITIGATION: EXPERT SCIENTIFIC EVIDENCE, SL 084 ALI-ABA 189 (2006) 5

ARGUMENT IN SUPPORT OF THE PETITION

A. Kochert Satisfied Antitrust Standing, Antitrust Injury and Harm To Competition

Respondents Anesthesiologists Associates P.C. ("AA") and Greater Lafayette Health Services, Inc. ("GLHS") oppose Kochert's Petition as if she either had never introduced expert testimony to substantiate her burden of proof on standing or failed to supply testimony on certain of its elements. Respondents' assertions are incorrect, and their protestations to the contrary reflect a twisted reading of the evidentiary record. As demonstrated throughout the Petition and in the Appendix, particularly as summarized at App. 132-139, Kochert proffered, and the district court found admissible, evidence sufficient to establish every material fact necessary to state a claim for relief under applicable law. It is because Kochert met those minimum requirements that the lower courts' confusion over admissibility and sufficiency standards presents a question that this Court should resolve.

Respondents expend considerable effort arguing that Kochert lacks standing, has not incurred antitrust injury and has failed to show harm to competition. They contend that Kochert fails to present any compelling reason to grant the Petition when well-settled federal law mandates that she demonstrate antitrust standing, antitrust injury and, consequently, whether she is an appropriate party to bring suit according to this Court's requirements. Kochert does not dispute these requirements as part of her burden. Respondents fail, however, to state the obvious: that the requirements of antitrust standing, which are inclusive of having to show antitrust injury and harm to competition (Pet. at 20-21, citing to Areeda and Hovenkamp), must be

shown by proofs. In this instance, the proofs were supplied in the form of substantial, admitted expert testimony.

Respondents make much of the fact that Kochert's experts never testified she was eliminated from competition in anesthesiology in 1998 and was driven from the market before a time, 2001, when they considered the anti-competitive act to have occurred. As made exceedingly clear from Kochert's Petition at 22-24 (App. 132-139), expert Dr. Seaman defined a continuum of events not starting and ending all in 2001, but starting in 1998, when Respondents controlled the markets, eliminating Kochert as a competitor, and culminating in 2001, when Kochert was still ready, willing and able to continue her practice in anesthesia, as late as 2002-2003 (App. 4). This buttresses the undisputed facts that she lived in the market continuously, she had, and continues to have, full and unblemished privileges at GLHS in anesthesiology, expressed a desire to continue in the practice of anesthesiology, and the only reason she could not service patients in anesthesia was due solely to being excluded as a competitor through the operation of the exclusive dealing arrangement between the Respondents. She was forced into another medical practice in her community to "provide food on the table" for her family and to stay in her community without disrupting the lives of her six children, her husband, and, of course, herself.[1] Even if the Respondents disagreed with these premises, there remains a material question of fact

[1] She also cannot be faulted for mitigating her damages, if viewed within a legal framework, by earning income in another medical specialty. Just as it is unnecessary to exhaust administrative remedies when it would be futile, it is, in addition, unnecessary to continue to pursue a practice in anesthesia when another party's antitrust violation has made that futile.

for a jury regarding her standing in 2001 (*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987-988 (D.C. Cir. 1977)) (manifesting an intention to enter the marketplace presents a question of fact for the jury in an antitrust case on these issues), and when anticompetitive activity commenced as part of a continuum.

Second, Respondents argue that Kochert failed to prove harm to competition. Nothing could be further from the truth.[2] As Kochert illustrated, harm to competition is measured in the alternative by diminished quality of care, increased pricing or diminished output arising out of the exclusive arrangement. Pet. at 24-25. Kochert has shown all three through the testimony of her experts. Pet. at 25. Similarly, Kochert was injured from the operation of this arrangement through loss of income from her business – substantiated, once more, by admissible expert testimony. Pet. at 25; App. at 123-124.

While Kochert addressed being a proper party in her Petition (at 23), it bears repeating that being a proper party is the conclusion resulting from substantiating the factors required to establish standing. Kochert has done this with detailed and thorough admitted expert testimony.

Finally, Respondents assert that Kochert lacks standing as a matter of law. That is true only if there are insufficient proofs to support the requisite elements of

---

[2] Kochert's proof follows closely the model set forth by Justice O'Connor in *Hyde*: "Exclusive dealing can have adverse economic consequences by allowing one supplier of . . . services unreasonably to deprive other suppliers of a market for their [services] . . . Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of . . . sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984).

standing, akin to showing causation in a tort case, as Kochert points out. Pet. at 21-22. These proofs consist of admitted expert testimony, shown by Kochert to exist in the record; nowhere did the lower courts ever state that this testimony did not reach all material facts.

B. Lower Federal Courts Have Increasingly Confused Admissibility and Sufficiency

Respondents argue that, "[it] is Kochert, and not the lower courts, who confuses the standards for admissibility and sufficiency", and that the increasingly prevalent melding of admissibility and sufficiency is a phenomenon of "academic" interest only. AA Br. at 8; GLHS Br. at 16. But this admittedly interesting academic issue has enormous practical significance. It muddies the trial process considerably, sowing confusion in at least three areas: the parties' pretrial obligations, district courts' gatekeeping and supervisory responsibilities, and appellate courts' ability to review the bases for the decisions below.

Kochert cites several noted authorities who have commented on this post-*Daubert* confusion. *See, e.g.*, Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 Antitrust L.J. 663 (1997). Pet. at 3, 4, 15, 20. Kochert has already identified that Judge Rothstein believes there now exists a "conflict in the circuits" over whether the inquiry under Rule 702 is separate from any inquiry into sufficiency. Pet. at 4, 16, 20.

Moreover, Professor Margaret Berger, possibly the leading evidence and procedure scholar in the nation today, has similarly commented repeatedly on this post-*Daubert* trend. Like Judge Rothstein, Professor Berger's

focus has been on decisions that "incorporate a . . . sufficiency standard into the . . . court's admissibility determination." Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 Law & Contemp. Probs. 289, 322, 325 (2001) ("*Upsetting the Balance*"). Professor Berger noted and discussed this confusion of standards in the opening chapter of the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000). After *Daubert*, she observed, "the benefits of economy and efficiency that accrue when expert proof is considered in the context of admissibility determinations may tempt courts to consider sufficiency when ruling on admissibility." *Id.* at 22.

Judge Rothstein and Professor Berger identified several cases in which admissibility and sufficiency effectively merged, thus creating obfuscation in this area of the law. Berger, *Upsetting the Balance*, at 322 (federal decisions incorporate a state's sufficiency standard into the federal court's admissibility determination) (n. 192, *e.g.*, *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999) ("Because this action is based on diversity, Georgia substantive standards of law must apply. Proffered expert testimony must meet the legal as well as the substantive issues of the case."); *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1398 (D. Or. 1996) ("Under Oregon law, the plaintiffs in this litigation must prove not merely the possibility of a causal connection between breast implants and the alleged systemic disease but the medical probability of a causal connection."); and Rothstein, *Opinion and Expert Testimony . . .*, SL 084 ALI-ABA, at 202-203 (nn. 1591-1601).

As occurred in this case, confusion exists at the two decision points of admissibility and sufficiency. While this

phenomenon occurs more so at the former of these two junctures (importing sufficiency standards into the admissibility judgment), the effect – confusion among litigants and members of the bar – remains the same. The parties are thus left without guidance regarding what is at issue at both junctures, and this practice undermines trial practice by shortchanging the jury's role in the process. This was exactly the lesson of the Second Circuit's decision in *In re Joint Eastern & Southern Dist. Litig. v. U.S. Mineral Products Co.*, 52 F.3d 1124 (2d Cir. 1995) (Pet. at 16), a lesson ignored by the Seventh Circuit here. Whereas the Second Circuit reversed a district court's judgment that had imported *Daubert* gatekeeping principles into its sufficiency evaluation, the Seventh Circuit permitted the district court below to do the same thing. Respondents assert that the Second Circuit's decision does not conflict with the Seventh Circuit's decision. But their assertions are nothing more than that; the Second Circuit reversed the lower court for conflating admissibility and sufficiency analyses; the Seventh Circuit upheld the lower court's conflation of these separate standards. Therein lies the conflict.

The Petition is grounded on the principle that passing the critical review of expert testimony mandated by Rule 702 ordinarily will mean that the summary judgment standard is met.[3] If a court finds otherwise, the Petition argues, it should explain why *Daubert*-worthy evidence is

[3] Respondent AA concedes this point, admitting, "when 'all of the essential parts of a party's case pass *Daubert*, this will virtually always be enough to proceed to trial.'" AA Br. at 7, quoting Petition at 13-14. *See, e.g., Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995) (if the evidence met the *Daubert* criteria, then "the plaintiffs introduced sufficient evidence . . . to present their claim to the jury.").

not sufficient to reach a jury. The Respondents' confusion in this case stems from its myopic understanding of what *Daubert* has wrought. AA, for instance, suggests that *Daubert* heralded a less stringent standard for admitting expert testimony as compared to the general acceptance test of *Frye v. United States*, 293 F. 1013 (1923). AA Br. at 8. This is simply incorrect, as has been recognized by this Court, lower federal courts, and scholars. *See, e.g., Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."); *Wilson v. City of Chicago*, 6 F.3d 1233, 1238-1239 (7th Cir. 1993), as modified on denial of reh'g. (Dec. 8, 1993) ("The elimination of formal barriers to expert testimony has merely shifted to the trial judge the responsibility for keeping 'junk science' out of the courtroom . . . It is a responsibility to be taken seriously."); Cheng & Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472 (2005) ("In federal courts . . . *Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely.") *Daubert* and the amendments to Fed. Rule of Evid. 702 raised the standards of proof; they did not lower them.

The *Daubert* threshold is a significant step in the pretrial process, and a party who has successfully overcome its "exacting standards" should reasonably expect that, absent some good reasons to the contrary, she has established material facts that should be resolved by a jury. As the Ninth Circuit on remand in *Daubert* pointed out, the relevancy requirement is inextricably tied to materiality:

> We must ensure that the proposed testimony is "relevant to the task at hand," *Id.* at 2797, i.e.,

> that it logically advances a material aspect of the proposing party's case.

43 F.3d 1311, 1315 (9th Cir. 1995). Admitted expert evidence thus advances material facts, the very facts that are necessary to establish a claim for relief that satisfies the requirements of Rule 56.

The crux of Kochert's position is that the confusion manifest in the lower courts between admissibility and sufficiency is a natural product of the more muscular evidentiary standards explicated in *Daubert*. As noted above, much of the confusion has occurred on the evidentiary side, where courts import summary judgment principles into their admissibility analyses. Indeed, the 2000 amendments to Rule 702 explicitly employed the word sufficiency when they incorporated *Daubert* principles into the Rule itself. Rule 702 requires expert testimony to be "based upon sufficient facts or data." Fed. Rule of Evid. 702. Rule 702's sufficiency requirement is not the same as demanded by Fed. R. Civ. P. 56(c), but it does propel the two rules onto a collision course.

C. Kochert Has Not Waived any "Question Presented"

As a consequence of the persistent melding of admissibility and sufficiency among lower courts, the Petition calls upon this Court to instruct them to "make clear the bases for their rulings." Respondents can hardly object to this proposal, since they strenuously contend that the lower courts gave adequate reasons in this case. Yet AA and GLHS contradict their position by saying Kochert waived the issue of courts having to make clear the bases for their rulings. As shown in the Appendix to this reply,

Petitioner's principle and reply briefs before the Seventh Circuit, as well as post oral argument submissions, are replete with materials relating to an analysis of the confusion surrounding admissibility and sufficiency. Also noted is the district court's failure to opine where Kochert failed to introduce expert testimony regarding any facts that are necessary to make out a claim under applicable law. *See* App., Reply Br. at 6. Additionally, the Respondents' claim that Kochert waived one of her questions to this Court because she failed to raise it before the Seventh Circuit below is incomprehensible. Since a Court of Appeals review of a district court's summary judgment order is *de novo*, Kochert could not have foreseen, without first reading its opinion, that the Seventh Circuit would fail to address why admitted expert testimony did not satisfy the requisite elements of her cause of action.

D. Conclusion

There exists compelling reasons for this Court to grant the Petition. Summary judgment orders are fueled by the principle that no reasonable jury could conclude that the proofs on all elements of the burden of proof are sufficient to find for the non-movant. *See, e.g.*, AA Br. at 8. In ordering summary judgment, the courts below disregarded admitted expert evidence and other proof that unequivocally established material facts in dispute on all elements necessary to state a claim for relief. This anomalous outcome resulted from these courts having conflated admissibility and sufficiency considerations, allowing them to weigh the persuasiveness of Kochert's proof, a task constitutionally left to the jury. This melding of admissibility and sufficiency has become all too frequent among lower courts. The instant case provides this Court

with the opportunity to clarify the standards of admissibility under Fed. Rules of Evid. 702 and the standards for summary judgment under Fed. R. Civ. P. 56(c).

Petitioner, Carolyn G. Kochert, M.D., thus requests that this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

MILES J. ZAREMSKI
Counsel of Record
KAMENSKY RUBINSTEIN HOCHMAN AND DELOTT, LLP
7250 N. Cicero Avenue, Suite 200
Lincolnwood, Illinois 60712
Telephone: (847) 982-1776
Facsimile: (847) 982-1676

DAVID L. FAIGMAN
200 McAllister St.
San Francisco, California 94102-4978
Telephone: (415) 565-4739
Facsimile: (415) 565-4865

PETER C. CARSTENSEN
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, Wisconsin 53706
Telephone: (608) 263-7416
Facsimile: (608) 262-5485

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
Telephone: (202) 944-2874
Facsimile: (202) 965-0920

Attorneys for Petitioner

App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc., d/b/a Lafayette Home Hospital, d/b/a St. Elizabeth Medical Center, John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamenski Rubinstein
Hochman & Delott, LLP
7250 N. Circero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

* * *

IV. MATERIAL QUESTIONS OF FACT REMAIN FOR A JURY TO DECIDE GIVEN THE OPINIONS OF EXPERT TESTIMONY

This appeal presents the quite bizarre situation in which a district court found expert testimony admissible regarding all material facts in dispute, but granted summary judgment on the basis that no material facts were in dispute. In the case law, summary judgments typically, if not almost exclusively, follow a district court's ruling that a party's expert's opinions are *inadmissible* under Rule 702 and *Daubert*. Here, the district court found the appellant's experts to be both relevant and reliable, yet granted defendants' motions for summary judgment. Given the basic logic of the rules of evidence and procedure, this outcome is nonsensical.

Ordinarily, exclusion of expert testimony means that the offering party has failed to produce admissible evidence regarding a material fact in dispute. *Weisgram v. Marley,* 528 U.S. 440, 443 (2000) (expert testimony found not scientifically sound and speculative is incompetent to prove plaintiffs case). Expert testimony may be excluded because it is either irrelevant or unreliable. In either case, in the absence of other admissible evidence regarding a material fact, summary judgment is appropriate. In effect, therefore, the district court ruled that Kochert's expert evidence was relevant to material facts in dispute and was based on reliable methods and principles, yet not sufficiently "persuasive" to withstand summary judgment. This ruling is illogical on its face, and indicates that the district

court inappropriately weighed evidence when it granted defendants' motions for summary judgment.

As outlined in *Daubert,* and incorporated into amended FRE 702, the admissibility determination is two-fold. First, the court must consider whether the proffered evidence is relevant, or "fits," the case at hand. *Daubert,* 509 U.S. at 591 (*citing United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir. 1985)). This, like most relevancy inquiries, is a logical determination regarding whether the evidence has probative value concerning some material fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II),* 43 F.3d 1311, 1315 (9th Cir. 1995) ("[W]e must ensure that the proposed expert testimony is 'relevant to the task at hand,' i.e., that it logically advances a material aspect of the proposing party's case.") (Citation omitted). The Supreme Court referred to this first prong of the analysis as the "fit" requirement. Rule 401, for instance, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In *Daubert,* the Court quoted Judge Weinstein and Professor Berger, stating, "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert,* 509 U.S. at 591 (*quoting* 3 Weinstein & Berger ¶ 702[02] at 702-18). In effect, therefore, the determination that expert evidence is admissible indicates that the evidence is material (i.e., "of consequence to the determination of the action"). Moreover, appellate courts must defer to the district court on this issue, absent an abuse of discretion. *General Electric v. Joiner,* 522 U.S. 136, 143 (1997).

The second finding necessary to admissibility is that the basis for the expert opinion is scientifically valid. *Daubert*, 509 U.S. at 590, n. 9 ("In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.") (Emphasis in original). This determination is a "preliminary fact" that must be made "pursuant to Rule 104(a)." *Id.* at 592. Under this standard, then, the district court is charged with determining whether the basis for the proffered expert testimony is scientifically valid, and this matter "should be established by a preponderance of proof." *Id.* at 593, n.10 *(citing Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)), The district court's determination that the basis for expert testimony is sufficiently valid to admit will only be overturned on appeal by a showing of an abuse of discretion. *Joiner,* 522 U.S. at 143.

With its 11-15-04 rulings, the district court found that the expert opinions were relevant to material facts and scientifically valid. On these findings, the appellate court owes deference. Yet, paradoxically, the district court granted summary judgment, notwithstanding this determination that plaintiffs expert testimony was admissible.

Although the evidentiary determination under FRE 702 is not coterminous with the sufficiency determination under FRCP 50(a)(1), there is a logical structure that must pertain to determinations made under these two provisions. The logic is as follows. In order to grant summary judgment, a court must find that there is insufficient evidence on those material facts that are necessary to create a legal claim such that a reasonable jury could not find for the non-moving party on all of those facts. Suppose a single fact, say Fact A, was sufficient to establish a claim under applicable law. If expert testimony was found to be

relevant and reliable on the question of Fact A, this, by necessity, would be sufficient to avoid summary judgment. In this situation, the finding that the expert testimony is "relevant" is tantamount to saying that there is a material fact in dispute. *See Daubert II,* 43 F.3d 1311, 1315 (9th Cir. 1995) ("[W]e must ensure that the proposed expert testimony is 'relevant to the task at hand,' *i.e.*, that it logically advances a material aspect of the proposing party's case.") (Citation omitted). This conclusion is buttressed by the fact, as noted above, that admissibility is established by the preponderance of the evidence standard, whereas summary judgment is proper under the less demanding standard that no reasonable jury could find the fact in issue.

To be sure, the admissibility determination is not identical to the issue presented by summary judgment. The former involves whether the empirical basis for the expert opinion is more likely than not valid, whereas the latter asks whether a reasonable jury could find that Fact A is established by a preponderance of the evidence. But there is an obvious correspondence between the two. If an expert opines that Fact A exists, and the court has found that this opinion is, more likely than not, based on valid methods and principles, it would indeed be the highly unusual case in which the admission of the opinion would not be enough to avoid summary judgment. And this appears to be exactly the situation in the case law. Although it is difficult to prove a negative, a thorough review of the case law has failed to uncover any cases in which a court found that expert testimony was both relevant and reliable regarding material facts, but that summary judgment was then appropriate. This review demonstrates dearly that the ordinary course of events is that summary

judgment follows *exclusion* of expert testimony, not its admission.

This basic analysis is true more generally as well. If, for example, expert evidence is admissible regarding Facts A, B, and C, and these three facts are necessary to make out a claim under applicable law, then once again the decision to admit the evidence compels the conclusion that summary judgment is improper. As a matter of logical necessity, therefore, the only situation in which summary judgment would be appropriate is if there is no admissible evidence, expert or otherwise, on a particular fact that is necessary for stating a legal claim. For example, if expert testimony is admitted only as regards Facts A, B, and C, but Facts A, B, C, and D are necessary to create a claim under applicable law, summary judgment would be appropriate. Equally true is that expert opinion testimony should not be admitted if it is contrary to prevailing law, or connected to existing data only by the *ipse dixit* of the expert. *Joiner*, 522 U.S. at 146. While this did not occur here, it is nonsensical to believe the district court would find admissible opinions based on data or methodology not deemed acceptable by the prevailing law of this circuit.

In this case, too, there is no suggestion that Kochert failed to introduce expert testimony regarding any facts that are necessary to make out a claim under applicable law. Indeed, the contrary is true. For example, in his 11-15-04 *Daubert* order on Seaman (R. 392), the district court ruled that, "**Dr. Seaman's testimony, defining the product and geographic markets, is not only relevant to this case, but is a central issue**," (at 2) (emphasis added). Given its determined reliability, how is it possible that this expert's evidence is not sufficient to create a dispute over a material fact? The district court

essentially answers this query by stating that its admissibility decision "did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact." *Kochert,* 372 F.Supp.2d at 512-13. But the district court believed only it could only adjudicate persuasiveness ("It will be necessary for this court to wade through that problem [ultimately persuasive] . . . during summary judgment . . . " 11-15-04 Order at 1, R. 393).

The first ground here is, simply put, an inappropriate basis for granting summary judgment District courts cannot weigh the evidence; this is a task for the jury here. *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655 (7th Cir. 2002) (warning against the "trap" of weighing conflicting evidence – "the job of the jury"); *Smith v. Ford*, 215 F.3d 713, 719 (7th Cir. 2000) (Question of whether the expert is credible or whether his theories are correct is a factual one left for a jury.) (District court is limited to determining whether expert testimony is pertinent to an issue and whether the methodology underlying that testimony is sound.); and *Ritchie v. Glidden* 242 F.3d 713, 723 (7th Cir. 2001) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment . . . ") (citation omitted).

The second ground, sufficiency, is properly a component of summary judgment, but it cannot conceal what appears to have occurred in this case – the district court's weighing of the evidence on conflicting geographic markets and other material issues. The district court concluded that the geographic market included hospitals in Logansport and Lebanon, as well as facilities in other cities, and used drive times to support that conclusion. 372 F.Supp.2d

at 518. This was not Seaman's testimony at all, yet the district court found Seaman's data and methodology sound, relevant and reliable. Indeed, the admissibility determination under Rule 702 necessitates the finding that proffered testimony be "based on *sufficient* facts or data," be "the product of reliable principles and methods," and have been "applied . . . reliably to the facts of the case." Fed. R. Evid. 702 (emphasis added). Once again, notwithstanding the district court's statements to the contrary on how it viewed a geographic market, for example, the admissibility determination largely, if not completely, resolved the question of the existence of a genuine issue of material fact. *The admission of the expert testimony created genuine issues of material fact.*

Finally, this court is obligated to give deference to the district court's admissibility determination, but, to reiterate, review its grant of summary judgment *de novo*. This gives Kochert's arguments considerable procedural force. The district court's judgment that Kochert's experts' testimony is relevant to material facts, and that the basis for their opinions is scientifically valid, can only be overturned if it abused its discretion. After extensive briefing in this case on *Daubert* issues (29 docket entries),[12] including the parties' analyses of this circuit's decisions,[13] and two days of extensive oral arguments[14], such abuse surely should not be found by this court. At the same time,

---

[12] Dkt. Entries 290-293, 296-299, 302-303, 308-309, 325-328, 342-347, 350, 353, 360, 368.

[13] Dkt. Entries 365-367 (briefs totaling 120 pages without exhibits).

[14] They seemed more like hearings on motions for summary judgment. *See* transcript of arguments in Supp. App. at 28, 40, A-1, A-2, R. 428, 429.

however, this court reviews the district court's summary judgment order *de novo,* and thus must consider whether a genuine issue of material fact exists in this case. The admitted expert testimony creates such genuine issues. In effect, what must be a given of the district court's findings (i.e., the admissibility of Kochert's experts), provides the full explanation for overturning the district court's grant of summary judgment. *See Spirit v. Northwest*, ___ F.3d ___ 2005 WL 2990632, *10 (6th Cir. 2005) (reasonable and reliable expert opinion defeats summary judgment).

V. MATERIAL QUESTIONS OF FACT REMAIN AS TO CONTINUUM OF EVENTS/ANTITRUST STANDING, AND ANTITRUST INJURY

In an antitrust case, events are to be viewed, not in a vacuum or in isolation, but as a continuum, looking at the sequence, or whole, of events in determining anticompetitive behavior. *Aspen Highlands v. Aspen Skiing Co.,* 738 F.2d 1509 (10th Cir. 1984), *aff'd.,* 472 U.S. 585 (1985); *Continental Ore Co. et al. v. Union Carbide Co., et al.*, 370 U.S. 690, 693-695, 699 (1962); *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655-56 (7th Cir. 2002); and *City of Mishawaka, et al. v. Am. Electric Power Co., Inc.,* 616 F.2d 976, 986 (7th Cir. 1980) (reversing the

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc., d/b/a Lafayette Home Hospital, d/b/a St Elizabeth Medical Center, John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamenski Rubinstein
Hochman & Delott, LLP
7250 N. Cicero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

* * *

benefit of competition in anesthesia services at either hospital or between the two hospitals. Though not gone from anesthesiology, Kochert commenced an alternative, but fledgling, medical practice in pain management starting in the fall, 2000 (12/01/03 dep. (138)) because she recognized defendant AA, with the active collaboration of GLHS, was monopolizing the market for her preferred (and more profitable) business, anesthesia. Moreover, the evidence establishes that the exclusive contract in this relatively isolated market has had, and will continue to result in reduced quality, decreased quantity and increased real prices for anesthesia services.

I. EXPERT TESTIMONY ESTABLISHES MATERIAL QUESTIONS OF FACT

The standards of appellate review are clear and lack controversy in this matter. After two days of hearings and based on over 250 pages of pleadings from the parties on *Daubert* issues, the district court concluded that Kochert's experts' opinions were admissible. Unless the district court misapplied the *Daubert* framework, which there is no indication is the case here, this court will not disturb the district court's findings unless they are manifestly erroneous. *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Mihailovich v. Laatsch,* 359 F.3d 892, 918 (7th Cir. 2004). Despite finding Kochert's experts admissible, however, the district court granted the defendants' motions for summary judgment, finding that her experts' opinions were not adequately "persuasive." This conclusion is reviewed on appeal *de novo,* and all facts are construed in favor of the non-moving party. *Dukin v. Equifax Check Services, Inc.*, 406 F.3d 410, 414 (7th Cir. 2005); *see Turner v.*

J.V.D.B. & Assoc., Inc., 330 F.3d 991, 994-995 (7th Cir. 2003). From these two non-controversial premises an exceedingly interesting, albeit not especially difficult to resolve, question arises regarding the association between rules of admissibility and standards of sufficiency.

As discussed at length in Kochert's principal brief, the situation in which both expert testimony is admitted and summary judgment is granted is a rare one. There appear to be four basic situations in which this occurs. It happens (1) when the expert testimony is contrary to prevailing law (*Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998)); (2) when admissible expert testimony or other competent evidence is not offered on a fact that is required to be proven under applicable law (*Barnes v. The Kerr Corp.*, 418 F.3d 583 (6th Cir. 2005)); (3) when the evidentiary rules are relaxed, as is true in a bench trial (*Smith-Kline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003) (Posner, J., presiding) ("In a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled.")); *see also Bradley v. Pickens Brown*, 852 F.Supp. 690, 700 (N.D. Ill. 1994); and (4) when the non-moving party's expert opinion is *admissible* to prove relevant facts but not *sufficient* to create a "material fact in dispute." It is this fourth circumstance that appears to divide Kochert and defendants and so will be the main focus of this section.

This fourth circumstance, as a practical matter, largely does not occur in practice. Contrary to defendants' mistaken impression, Kochert's argument that this situation does not occur is not a product of any confusion between admissibility rules and sufficiency standards. It is based on the fact that a well applied *Daubert* analysis will

operate to provide the information on which a sufficiency judgment must be made. The basic operating premises of the *Daubert* trilogy – *Daubert, Joiner,* and *Kumho Tire* (and now codified in Rule 702) – make plain the interconnectedness of the rules of admissibility and the standards of sufficiency.

Unfortunately, defendants' briefs display a deplorable lack of understanding of the basic lessons and principles of the *Daubert* trilogy. Admissibility judgments after *Daubert* and amended Rule 702 are substantially more than perfunctory checks on the methods and principles that lie at the base of proffered expert opinion. *See generally,* FAIGMAN, *ET AL.,* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, §§1:6-1:23 (Thompson/West 2005-2006 ed.); Margaret Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 38 (Federal Judicial Center, 2d ed. 2000). *Daubert* made clear that the basis for an expert's opinion must be both relevant to a material fact in dispute and scientifically valid. As the *Daubert* Court made plain, relevancy means "fit." *Daubert,* 509 U.S. at 591; *Wintz v. Northrop Corp.,* 110 F.3d 508, 512 (7th Cir. 1997) (expert testimony must "fit" the case by assisting the trier of fact in understanding the issues). Judge Kozinski explained the principle succinctly, stating that the fit requirement obliges district courts to "ensure that the proposed expert testimony is 'relevant to the task at hand,' *i.e* that it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II),* 43 F.3d 1311, 1315 (9th Cir. 1995). Thus, the defendants' concession that the district court found the *Daubert* relevancy requirement to have been met effectively accepts the proposition that Kochert's

experts' opinions fit material or consequential facts in the case. *Daubert*, 509 U.S. at 591; *see also* BLACK'S LAW DICTIONARY, at 998 (defining "material" as "[h]aving some logical connection with the consequential facts").

The defendants' misunderstanding of the *Daubert* trilogy is even more striking in regard to the second prong of the analysis, evidentiary reliability. Defendants' briefs argue that the *Daubert* court limits district court gatekeeping to the methods and principles supporting the experts' opinions, and that the gatekeeping function does not include consideration of how the evidence is to be used. AA's brief states that while Kochert's experts "met the . . . reliability standards under *Daubert,*" this was based "solely on principles and methodology, not on the conclusions [the experts] gēnerate[d]." AA Br. at 16. This careless recitation of *Daubert's* language entirely fails to capture the true import of *Daubert's* reliability demands. Defendants' argument leaves out the more central aspects of the *Daubert* trilogy, especially as set forth in *Joiner.* It would make no sense in scientific discourse to consider methods and principles underlying research without considering the uses to which the data are to be put. An animal study of the effects of second-hand smoke, for instance, might be perfectly appropriate methodologically, but might not support expert opinion that second-hand smoke causes cancer in humans. In *Joiner,* Chief Justice Rehnquist explicitly recognized the obvious interconnectedness between the methods and principles of a research program and the uses to which those data are to be put in court. He explained that, "conclusions and methodology are not entirely distinct from one another." *Joiner,* 522 U.S. at 146. He then added one of the most quoted lines of the *Daubert* trilogy, that " . . . nothing in *Daubert* or the Federal Rules

of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Id.; see also Zenith Electronics Corp. v. WH-TV Broadcasting Corp.,* 395 F.3d 416, 420 (7th Cir. 2005) (quoting *Joiner's ipse dixit* language). Contrary to defendants' apparent belief, there is no easy division establishing methods and principles as an evidentiary concern and the conclusions offered in court as a subject of sufficiency.

Despite defendants' weak attempts to the contrary, the district court's admission of Kochert's experts signified that court's view that relevant and reliable evidence was admissible on material facts in dispute. As discussed at length in Kochert's principal brief, admission of expert opinion on disputed facts creates a logical imperative that leads ineluctably to the conclusion that summary judgment was improper in this case.

Clearly, however, as defendants' briefs point out, it is possible for expert opinion to be admitted but, nonetheless, for summary judgment to be granted against the party that proffered that expertise. GLHS and AA rely on the same four cases, *Barnes, Bailey, Morgan,* and *Rebel Oil,* to substantiate their view that the district court acted properly when it found Kochert's experts' opinions to be relevant and based upon sound methodologies, but granted their motions for summary judgment. These cases do not support what the district court did. In none of the four cases that defendants rely upon did the court hold that summary judgment was properly invoked as regards disputed facts on which the non-moving party's experts had been admitted.

In *Barnes,* the Sixth Circuit found that, despite the admissibility of the non-moving party's experts, he had failed to establish a required element of his proof – causation – and that, in any event, the numerous warnings provided by [the moving party] " . . . were adequate as a matter of law." *Barnes,* 418 F.3d at 591. Defendants' use of *Bailey* is similarly inappropriate, since the trial court there had found the proffered expertise to be inadmissible (*Bailey,* 284 F.3d at 1246), and the Eleventh Circuit itself found the expert opinion to be inconsistent with facts that were not controverted. *Id.* at 1255.

The remaining two decisions, *Morgan* and *Rebel Oil,* present closer cases regarding defendants' claim. In *Morgan,* the Eighth Circuit initially noted that the district court had granted summary judgment without reaching the moving party's objections to the opponent's expert testimony. *Morgan,* 380 F.3d at 463. The Eighth Circuit, however, surmised that the district court had been troubled by methodological weaknesses in the non-moving party's expert testimony concerning certain regression analyses conducted – an admissibility consideration. The *Morgan* court then proceeded to review the lower court's ruling *de novo,* since no admissibility determination had been made below, and affirmed the lower court's summary judgment ruling. Only in passing did the court observe, "[ad]missible regressions . . . do not mean summary judgment is inappropriate." 380 F.3d at 468. To support this statement, the Eighth Circuit quoted *Daubert,* in which the court had stated, "[i]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment. . . . "

Id. [*Daubert,* 509 U.S. at 596.] Such a state of affairs was not presented in *Morgan* and is not the case here. Indeed, the district court here found that Kochert's experts' testimony all met the preponderance of evidence standard without even a mention of their constituting a "scintilla of evidence" not being able to meet a sufficiency hurdle.

The final decision of the four that defendants' extensive searching uncovered is *Rebel Oil.* In that case, as defendants contend here, the moving party argued that the district court acted properly in finding that the nonmoving party's expert testimony was admissible, but that summary judgment was nonetheless appropriate. *Rebel Oil,* 146 F.3d at 1096-97. A closer look at *Rebel Oil,* however, indicates that, like *Barnes,* the case illustrates the circumstance when the complaining party is unable to establish a required element of his proof and thus the expert testimony is not sufficient as a matter of law. 146 F.3d at 1097; *see Rebel Oil Co. v. Atlantic Richfield,* 957 F. Supp. 1184, 1202 (D. Nev. 1997) (expert's measurement of marginal cost of gasoline contrary to law (509 U.S. at 223)).

Moreover, the defendants rely on the methodology/conclusions distinction as it was discussed in *Rebel Oil* to support the bright line they seek to establish between admissibility/sufficiency. It is true that *Rebel Oil* quotes *Joiner* to buttress its dicta that, "[a]n expert witness maybe qualified to testify even though the expert's conclusions are legally incorrect." *See* AA Br. at 16. But the *Joiner* language that the Ninth Circuit and defendants rely upon to define their sufficiency analyses for purposes of summary judgment, in fact, defines the *admissibility standard* under *Daubert.* When a court concludes that "there is simply too great an analytical gap between the

data and the opinion proffered," there is "nothing in either *Daubert* or the Federal Rules of Evidence [that] requires a district court to *admit* [that] opinion evidence." *Joiner*, 522 U.S. at 146 (emphasis added). It is the defendants, not Kochert, who have confused admissibility determinations and sufficiency standards.

Although it is also theoretically possible for a court to *admit* expert testimony on a given set of facts, yet grant summary judgment because that testimony is not *sufficient* for a reasonable trier of fact to find those particular facts in accordance with that expert opinion, such a situation is likely to be exceedingly rare. Indeed, as a practical matter, it does not occur. And for good reason. The admissibility determination establishes that for the facts on which the experts' opinion is offered, the testimony is both relevant (*i.e.*, fits the legal dispute at hand) and reliable (*i.e.*, is based on scientifically valid methods and principles that can support the proffered opinions). Hence, under the *Daubert* trilogy, the decision to admit expert opinion is a declaration that the opinion is based on valid scientific methods and principles, and that the opinion fits the material facts to which it is directed. The district court made just such a declaration below. To grant summary judgment in the teeth of this admissibility determination, regarding the very facts on which the expert opinion has been admitted, indicates manifest confusion concerning the interconnectedness of admissibility determinations and sufficiency judgments. Expert opinion that meets the rigors of the *Daubert* test relating to specific facts in dispute will invariably be sufficient to avoid summary judgment regarding those factual issues. This analysis does not, as defendants claim, confuse admissibility and sufficiency. Quite the contrary is true. It

places proper emphasis on the relationship between admissibility and sufficiency. The admissibility determination provides the grist for sufficiency's mill. The defendants' argument effectively invites trial courts to weigh admitted expert testimony on disputed facts, and thus invade the province of the jury, just as happened here.

II. KOCHERT HAS ANTITRUST STANDING AND HAS SUSTAINED ANTITRUST INJURY

As a result of the district court's *Daubert* rulings, Seaman's opinion on the time period to commence anti-competitive behavior is sufficient to have a jury consider it; so, too, is his opinion that a continuum of events,[3] consistent with prevailing antitrust legal doctrine, is now ripe for a trier of fact to weigh. The events must then be measured from 3/1/98, as Seaman opines, taking into account that

* * *

[3] GLHS states the district court did not focus on one single (isolated) event. GLHS Br. at 5. If so, the district court weighed Seaman's opinion on continuum and disregarded it, favoring its own views on the events. Such weighing is not permitted by this circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 05-1196

CAROLYN KOCHERT, M.D.	) **Appeal from the**
Plaintiff-Appellant	) **United States**
	) **District Court for the**
v.	) **Northern District of**
	) **Indiana, Hammond**
GREATER LAFAYETTE HEALTH SERVICES, INC., JOHN WALLING and ANESTHESIOLOGY ASSOCIATES, P.C.	) **Division at Lafayette**
	) **Federal Court**
	) **No. 4:01CV0027AS**
Defendants-Appellees.	)

NOTICE TO COURT TO ADDRESS INACCURACIES IN ORAL ARGUMENT

Comes now this plaintiff-appellant, Carolyn Kochert, M.D. ("Kochert"), by her counsel, Miles J. Zaremski and Alon Stein of Kamensky Rubinstein Hochman & Delott, LLP, and files this Notice to Address Inaccuracies in Oral Argument.[1] In support thereof, Kochert states as follows.

Oral argument proceeded in this matter on February 13, 2006 before the Hons. Michael S. Kanne, Terence T. Evans and Anne Claire Williams. During the oral argument, Judy Woods, attorney for defendant-appellee,

[1] This filing is pursuant to direction received from the court clerk's office on February 15, 2006. Should it be more appropriate to present the substance of this pleading via a motion, counsel will proceed with one upon direction from the court.

Anesthesiology Associates, P.C., stated to the court as follows:[2]

* * *

> . . . Part of the problem here and you heard it this morning, from Mr. Zaremski himself, is that Mr. Zaremski is attributing the relevancy standard under *Daubert* to say that it is relevant to a material fact and therefore once relevancy has been established under *Daubert*, there is a material fact at issue. In fact, **the relevancy standard under *Daubert* doesn't even mention materiality.** It's much broader than that. And in fact we know from numerous cases decided under *Daubert* and its progeny that in fact an expert may opine as to many things in a case that are not material, that are not outcome determinative and what we have here is a leaping over that critical distinction between the relevancy standard in *Daubert* and the sufficiency standard in a summary judgment case particularly a case involving antitrust where there is a long history of federal jurisprudence and Supreme Court cases that say that district court judges in antitrust cases have an even greater burden to test the sufficiency of the evidence and that is exactly what we have here. **So it is that critical misunderstanding that relevance and *Daubert* means materiality** that has led to part of the problem here. Now, what what we also have here is the difference and the something that's pointed out in the Joiner case, that relevancy means fit. Again, **the appellant has attributed that to**

[2] Transcribed by Ramona Washington, a secretary in the law firm for Kochert, on February 15, 2006. See Affidavit, attached.

> **mean that once that fit is defined for purposes of the *Daubert* test as the district court did in this case, that there is a material fact in dispute. It does not mean that,** it is not what *Joiner* holds and that is not what we have here.
>
> * * *

26:21 – 28:16, Oral Argument Recording, ca.uscourt.gov. (Emphasis added.)

Daubert v. Merrell Dow, 509 U.S. 579, 481 (1993) states:

> Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a **fact in issue**.' This condition goes primarily to **relevance**. **'Expert testimony which does not relate to any issue is not relevant** and, ergo, non-helpful.' (citation omitted) ('An additional consideration under Rule 702 – and another **aspect of relevancy** – is whether expert testimony proffered in the case is sufficiently **tied to the facts of the case** that it **will aid the jury in resolving a factual dispute**'). The consideration has been aptly described by Judge Becker as one of '**fit**'. *Ibid.*" (emphasis added.)

Daubert v. Merrell Dow, 43 F. 3rd 1311, 1315 (9th Cir. 1995) (Daubert "II"), states:

> We must ensure that the proposed expert testimony is "relevant to the task at hand," *Id.* at 2797, i.e., that it logically advances a **material** aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "**fit**" requirement. *Id.* at 2796. (emphasis added.)

General Electric v. Joiner, 522 U.S. 136, 146 (1997) states,

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in *Daubert* . . . requires a district court to **admit** opinion testimony which is connected to existing data by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion offered. (second emphasis added.)

As a result of the above, defendant's counsel was inaccurate in telling this court during oral arguments that *Daubert* does not equate a finding of relevancy with materiality and issues in fact to aid the jury in resolving factual disputes.

Respectfully submitted,

CAROLYN G. KOCHERT

By: /s/ Miles J. Zaremski
One of Her Attorneys

Miles J. Zaremski, Esq.
Alon Stein, Esq.
KAMENSKY RUBINSTEIN HOCHMAN
& DELOTT, LLP
7250 N. Cicero Ave., Suite 200
Lincolnwood, Illinois 60712-1693
(847) 982-1776

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

—

(847) 982-1776
[Name And Address Omitted In Printing]

February 27, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission:
Relevency/Materiality Under Daubert

Judge Williams inquired of appellant's counsel during oral arguments on February 13, 2006 whether an admissibility ruling under *Daubert* means there is a finding of a material fact, (Recording of Oral Argument at 4:40 – 5:10), and whether summary judgment is rejected because there has been a material fact (5:32 – 5:49). The following cases, not previously cited, are provided to specifically answer these inquiries, *viz*, that a finding of relevancy under *Daubert* equates to determining a material fact in question; that sufficiency is the collective weight of material facts found admissible; and to preclude summary judgment facts must be disputed and material.

Flanagan v. Altria Group, Inc., 2005 WL 2769011, *2 (E.D. Mich. 2005) (expert testimony is relevant when it will assist the trier of fact in determining a material fact in question).

CFM Communications, LLC v. Mitts Telecasting Co., 2005 WL 2562651, *7 (E.D. Cal. 2005) (quoting *Daubert).*

Friend v. Time Manufacturing Co., 2005 WL 2484643 *2 (D. Ariz. 2005) (quoting *Daubert II).*

Phillips v. Water Bay Management Corp., 2002 U.S. Dist. LEXIS 7209, *7 (2002 DC Virg. Isl.) (relevant and admissible testimony lends sufficient materiality to withstand summary judgment).

Iwanaga v. Daihatsu America, Inc., 2001 WL 1910564, *12 (W.D. Tex. 2001) (summary judgment denied where reliable and relevant expert testimony established material facts).

Petitt v. Celebrity Cruises, Inc., 153 F. Supp.2d 240, 249 (S.D. N.Y. 2001) (expert testimony relevant, as conclusions are material).

–

In Re Joint Eastern & Southern District Asbestos Litigation, 52 F.3d 1124, 1132-1133 (2d Cir. 1995); *H E Stevenson v. E I DuPont,* 327 F.3d 400, 407 (5th Cir. 2003); *Adams v. Indiana Bell,* 2 F. Supp.2d 1077, 1112 (S.D. Ind. 1998); *Tyler v. Sterling Drug,* 19 F. Supp.2d 1239, 1243 (N.D. Okla. 1998) (sufficiency goes to weight of material facts found admissible viewed without judging credibility or weighing the evidence).

–

JPM, Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270, 273 (7th Cir. 1996) (Evans, J.) (to preclude summary judgment a fact must not only be genuinely disputed, but material; material fact effects outcome of case under governing law).

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
Stephen Pennell, Esq.

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

—

(847) 982-1776
[Name And Address Omitted In Printing]

March 14, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: *Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.*
Dkt. No.: 05-1196

Correction to March 13, 2006 FRAP 28(j), Circuit Rule 28(e) Submission

Dear Mr. Agnello:

On March 13, 2006, Appellant tendered the citation of *Frismer v. Upjohn Co.,* cited therein as 1995 WL 390059, *2, 3 (N.D. Ill. 1995 (unpubl.)), in a FRAP 28(j) submission (copy attached). This was an incorrect citation. The correct citation is ***Grismer v. Upjohn Co.,*** 1995 WL 390053, *2, 3 (N.D. Ill. 1995 (unpubl.)).

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

cc: Judy Woods, Esq.
Stephen Pennell, Esq.

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

(847) 982-1776
[Name And Address Omitted In Printing]

March 13, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality | under *Daubert Decision Within Seventh Circuit*

Judge Williams inquired of appellant's counsel at oral argument on February 13, 2006 as follows:

> "Yeah, but, when we get back to the Daubert ruling, this was just an admissibility ruling. And I agree the court said that it was relevant for purposes of the proceeding, but that doesn't mean that the court has to find there is a material fact, a material fact in dispute just because you meet that preliminary threshold under Daubert." (Recording of Oral Argument at 4:48 – 5:10);
>
> "But you aren't even able to find any cases that support your theory that just because a court makes that finding of relevance that that of necessity dictates a finding, a rejection of summary judgment because there has to be a material fact. You don't have any authority that goes that far, do you?" (Recording of Oral Argument at 5:32 – 5:49).

On February 27, 2006, Appellant's counsel tendered an FRAP 28(j) submission containing 11 cases to respond to these inquiries. This court allowed this filing to become part of the docket in this case on March 7, 2006.

Appellant did not list a decision by a court within this circuit in its February 27, 2006 submission. Consistent with the cases listed in that submission, further research reveals *Frismer v. Upjohn Co.,* 1995 WL 390059, *2, 3 (N.D. Ill. 1995 (unpubl.)) ("If the opinions [of plaintiff's experts under *Daubert*] are determined to be admissible, [movant's] motion for summary judgment will fail as plaintiff's [sic] will have raised a genuine issue of material fact") ("Unless [movant] can keep out plaintiff's experts' testimony, such testimony presents a genuine issue of material fact.")

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
Stephen Pennell, Esq.

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

—

(847) 982-1776
[Name And Address Omitted In Printing]

April 3, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality under *Daubert*

During oral argument on February 13, 2006, Judge Williams questioned the undersigned regarding the relationship among the relevancy standard under *Daubert,* materiality, and material issues of fact for a trier of fact when considering a motion for summary judgment. Her Honor also inquired about cases supporting Appellant positions. Besides decisions contained in Appellant's briefs, the undersigned tendered two Rule 28(j) submissions, one on February 27, 2006, and another on March 13, 2006 (as corrected for typographical errors in the citation on March 14, 2006). Both submissions were allowed for filing as part of the docket on March 7, 2006 and March 14, 2006, respectively. The cases in these submissions (equating relevancy under *Daubert* with materiality and "fit" to the relevant issues, and requiring admitted expert testimony to overcome a summary judgment) came from federal district courts within the 2nd, 3rd, 5th, [6th,] 7th, [9th] and 10th Circuits. The case cited below is significant in that it comes from a federal *circuit* court (ten and twelve years after the U.S.S.Ct. decision in *Daubert* and *Daubert II* (9th Cir.)) and reflects the conclusions in the district court decisions contained in the previously docketed 28(j) submissions regarding the relationships inquired into by

Judge Williams. The case cited below reinforces the language and propositions of the earlier submitted district court decisions and sheds further light on the relationships inquired into by Judge Williams at oral argument on February 13th.

The case is *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005).

In n. 3, at p. 883, the 10th Circuit stated in *Norris*, "... in determining whether there was a genuine issue of material fact to overcome Baxter's summary judgment motion, it was necessary for the district court to assess the admissibility of Plaintiff's experts under *Daubert*."

In n. 4, at 884, the Court recognized, "Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case. *Daubert v. Merrell Dow*, 43 F.3d 1311, 1315 (9th Cir. 1995) (on remand)."

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
Stephen Pennell, Esq.

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

—

(847) 982-1776
[Name And Address Omitted In Printing]

April 5, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality under *Daubert*

Dear Mr. Agnello:

This letter brings to the attention of the court two other pertinent and significant authorities that have come to Appellant's counsel's attention after oral argument per FRAP 28(j).[1] In FRAP 28(j) submissions,[2], Appellant's

[1] Oral arguments proceeded on February 13, 2006.

[2] Appellant's counsel recognizes that this is the 4th FRAP 28(j) submission since oral arguments that have brought pertinent and significant cases to the court's attention on the same, exceedingly important issue. Appellant's counsel is doing so, in good faith, and not to otherwise add unnecessary docket entries to this case, in order to

(Continued on following page)

counsel has brought to this court's attention federal case law arising out of, or in, the 2d, 3d, 5th, [6th,] 7th, 9th and 10th circuits. The following cases now come from federal district courts in the 11th Circuit, and were decided subsequent to the oral arguments in this case.

The cases are *Leathers v. Pfizer, Inc. & Warner-Lambert Co.,* 2006 U.S. Dist. LEXIS 11381 (N.D. Ga. (March 10, 2006)) and *Dukes v. Georgia,* 2006 WL 839403, *7, 12, 33 (N.D. Ga. (March 30, 2006)) (testimony is relevant when it advances a material aspect of the proposing party's case, described as "fit"; admitted expert testimony assists the jury and is therefore relevant; and without admitted expert testimony, summary judgment is appropriate).

At *12 in the *Leathers* opinion, the court states, " . . . the last factor requires that the expert opinion be **relevant** to the facts of the case. In other words, there must be a valid scientific connection to a **material** issue in the case. See Daubert, 509 U.S. at 591 (explaining that this final element requires a "fit" between the expert opinion and the facts of the case)." (Emphasis added). At *43, " . . . 'medical expert testimony [is] essential to prove causation in this case.' Defendants' Motion for Summary Judgment is premised upon the argument that Plaintiff has not presented admissible expert testimony establishing causation. The Court agrees."

---

honor his obligations of representing his client zealously within the boundaries of the law and, as a member of this court's bar, to provide assistance with its inquiries made at oral argument.

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
Stephen Pennell, Esq.

LAW OFFICES

KAMENSKY RUBINSTEIN HOCHMAN & DELOTT, LLP
AN LLP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 200
7250 NORTH CICERO AVENUE
LINCOLNWOOD, ILLINOIS 60712-1693

(847) 982-1776
[Name And Address Omitted In Printing]

May 10, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission Pursuant to Court's April 14, 2006 Order: Admissibility of Expert Testimony Encompassing Sufficiency to Overcome Summary Judgment

Dear Mr. Agnello:

On April 14, 2006, this Court issued an order in which any further [28(j)] submissions to be filed must concern a relevant published authority unavailable at the time of oral argument. Oral argument proceeded on February 13, 2006.

The decision in *Reid v. BMW of North America*, ___ F. Supp.2d ___, 2006 WL 1207923, * (N.D. Ga. (May 1, 2006)) is brought to the court's attention.

1. This decision was unavailable at the time of oral argument, having been decided May 1, 2006.

2. It is to be published (designated by the reference to "F. Supp.2d").

3. Its relevancy follows, below.

A relevant issue is whether the lower court, following a *Daubert* challenge, committed reversible error by first admitting all the testimony of Appellant's four challenged experts on all material facts essential to Appellant's burden, but then granting Appellees' motions for summary judgment because it either was not persuaded by the experts' opinions or their testimony was insufficient to create a genuine issue of material fact. 372 F.Supp.2d 509, 512-513 (N.D. Ind. 2004). Appellant also first raised this issue, conflation of sufficiency and admissibility, in her main brief (at pp. 28-32) and reply brief (at pp. 9-10).

In *Reid,* Senior Judge Shoob admitted plaintiff's expert testimony following a *Daubert* challenge while defendants' motions for summary judgment were pending. The court defined a fact as "material" when controlling substantive law identifies it as an essential element to the non-movant's case, and an issue as "genuine" when the

evidence, taken as a whole, is such that a reasonable, or rational, jury could return a verdict for the non-movant. *Id.* at *4.[1] The admitted expert testimony constituted sufficient evidence to substantiate material facts and to establish genuine issues, thus defeating the summary judgment motions. *Id.* at *4-6.

Reid is also relevant to the instant case because it shows that admitting relevant and reliable expert testimony on disputed facts satisfies the sufficiency requirement necessary to overcome summary judgment.

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
Stephen Pennell, Esq.

[1] See *Scaife v. Cook County, et al.*, Dkt. No. 04-2966 (7th Cir. May 10, 2006), *Slip Op.* at 6.